JOINT APPENDIX VOLUME 2 OF 2 (Pages JA5654 – JA6694)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2013-5093

CMS CONTRACT MANAGEMENT SERVICES,
THE HOUSING AUTHORITY OF THE CITY OF BREMERTON,
NATIONAL HOUSING COMPLIANCE,
ASSISTED HOUSING SERVICES CORP., NORTH TAMPA HOUSING DEVELOPMENT CORP., CALIFORNIA AFFORDABLE HOUSING INITIATIVES, INC., SOUTHWEST HOUSING COMPLIANCE CORPORATION, and NAVIGATE AFFORDABLE HOUSING PARTNERS
(formerly known as Jefferson County Assisted Housing Corporation),

Plaintiffs-Appellants,

v.

MASSACHUSETTS HOUSING FINANCE AGENCY,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellee

Appeal from the United States Court of Federal Claims in consolidated case Nos. 12-CV-0852, 12-CV-0853, 12-CV-0862, 12-CV-0864, and 12-CV-0869, Judge Thomas C. Wheeler

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Michael J. Schaengold
Robert K. Tompkins
Elizabeth M. Gill
Patton Boggs LLP
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6523
Counsel for Plaintiff-Appellant Navigate Affordable Housing Partners (on behalf of All Plaintiffs-Appellants)

Stuart F. Delery
Jeanne E. Davidson
Kirk T. Manhardt
Douglas K. Mickle
Joseph A. Pixley
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
PO Box 480, Ben Franklin Station
Washington, DC 20044
(202) 307-0383
Counsel for Defendant-Appellee

August 15, 2013

Additional Counsel Listed Inside Front Cover

Gabriel E. Kennon
Cohen Mohr LLC
1055 Thomas Jefferson St., NW, Suite 504
Washington, DC 20007
(202) 342-2550
Counsel for Plaintiff-Appellee

Of Counsel for Plaintiffs-Appellants:
Colm P. Nelson
Belcher Swanson Law Firm PLLC
900 Dupont Street
Bellingham, WA 98225
(360) 734-6390
Counsel for
CMS Contract Management Services &
The Housing Authority Of The City Of Bremerton

Of Counsel for Defendant-Appellee:
Doris S. Finnerman
Office of General Counsel
U.S. Department of Housing and
Urban Development
Washington, DC

Michael R. Golden
PEPPER HAMILTON
600 Fourteenth Street, N.W.
Hamilton Square
Washington, DC 20005
(202) 220-1244
Counsel for
National Housing Compliance

Kathie Soroka
Office of General Counsel
U.S. Department of Housing and
Urban Development
Washington, DC

Neil O'Donnell
Dennis Callahan
ROGERS JOSEPH O'DONNELL
311 California Street
10th Floor
San Francisco, CA 94104
(415) 956-2828
Counsel for Assisted Housing Services Corp.,
North Tampa Housing Development Corp., &
California Affordable Housing Initiatives, Inc.

Richard Vacura
Tina D. Reynolds
K. Alyse Latour
MORRISON & FOERSTER LLP
1650 Tysons Boulevard
Suite 400
McLean, VA 22102
(703) 760-7764
Counsel for Southwest Housing Compliance Corp.

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BID PROTEST

No. 12-852, -853, -862, -864, -869C
(Judge Wheeler)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CMS CONTRACT MANAGEMENT SERVICES, et al.,

Plaintiffs,

v.

THE UNITED STATES.

Defendant.

DEFENDANT'S MOTION TO DISMISS, AND IN THE ALTERNATIVE, MOTION FOR JUDGMENT UPON THE ADMINISTRATIVE RECORD

STUART F. DELERY
Principal Deputy Assistant Attorney General

JEANNE E. DAVIDSON
Director

KIRK T. MANHARDT
Assistant Director

DOUGLAS K. MICKLE
Senior Trial Counsel
Civil Division
Commercial Litigation Branch
United States Department of Justice
PO Box 480
Ben Franklin Station
Washington, DC 20044
Tel: (202) 307-0383
Fax: (202) 353-7988

Attorneys for Defendant

OF COUNSEL:

JOSEPH A. PIXLEY
Trial Attorney
Civil Division
Commercial Litigation Branch
United States Department of Justice

DORIE FINNERMAN
KATHIE SOROKA
KASEY M. PODZIUS
Office of General Counsel
U.S. Department of Housing and Urban Development
Washington, D.C.

January 4, 2013

We show below that HUD's 38-year history in awarding ACCs pursuant to the Federal Grant and Cooperative Agreement Act is proper because HUD has not and is not acquiring any services when it grants administrative authority and transfers funds to PHAs via the ACCs. Rather, HUD is engaged in a core statutory duty of providing funding assistance to state-sponsored PHAs, a process that is fundamentally different from a procurement, which generally has as its purpose the acquisition of goods or services through purchase, lease or barter.

GAO erred because it failed to address the statutory authority for the Section 8 program, the statutory authority conferred upon the PHAs as contract administrators pursuant to the HAP contracts, and the benefit to the PHAs in participating in a housing program to promote and oversee exactly the kind of housing the PHAs were created to promote and oversee. In sum, GAO erred because it failed to consider the role Congress has established for local PHAs to assume in this important Government function.

ARGUMENT

I. The Court Lacks Subject Matter Jurisdiction Because This Is Not A Procurement

A. The Court's Bid Protest Jurisdiction Is Limited To Entertaining Challenges To Procurements

Jurisdiction must be established as a threshold matter before the Court may proceed with the merits of any action. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998). This Court's jurisdiction to entertain bid protests is defined by the Tucker Act, 28 U.S.C. § 1491(b). Specifically, the Court possesses "jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation ***in connection with a procurement or a proposed procurement***." 28 U.S.C.

§ 1491 (b)(1) (emphasis added); *Res. Conservation Group, LLC v. United States*, 597 F.3d 1238, 1242-45 (Fed. Cir. 2010). HUD's 38-year practice of using ACCs to fund Section 8 housing assistance through state and local PHAs is not a procurement, and thus this Court lacks jurisdiction to entertain any challenge to HUD's practice.

B. Grants And Cooperative Agreements Are Not Procurements

The term "procurement" is not defined by the Tucker Act. 28 U.S.C. § 1491; *see also Res. Conservation*, 597 F.3d at 1245. However, the Federal Circuit has applied the definition of "procurement" found in 41 U.S.C. § 111 (effective January 4, 2011) to the Tucker Act's use of the term.[13] In *Distributed Solutions, Inc. v. United States*, 539 F.3d 1340, 1345-46 (Fed. Cir. 2008), the Federal Circuit held that the Tucker Act's dual waiver of sovereign immunity and grant of subject matter jurisdiction for "procurement"-related protests begins with the initial formulation of an agency need for property or services and ends with the completion of a contract. Therefore, under the Federal Circuit's broad interpretation, any perceived statutory or regulatory misstep by an agency that has at least initiated a process for determining its own "need for property or services" may be challenged in court. *See id.*

However, the *Distributed Solutions* holding does not extend the jurisdiction of the Court beyond challenges to an agency's initial determination of its own needs.[14] *See id.* at 1346

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13 Section 111 of title 41 defines the term "procurement" to include all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout. 41 U.S.C. § 111.

14 Sensibly, and consistent with our position here, this Court has limited the scope of *Distributed Solutions*, citing concern that a broad reading would "unlock a veritable Pandora's box of bid protest challenges to many internal agency decisions that never ripen into government procurements," *see Int'l Genomics Consortium v. United States*, 104 Fed. Cl. 669, 676 (2012). The Court held that jurisdiction in *Distributed Solutions* turned on the fact that USAID initiated "a formal contracting process by issuing an RFI" rather than merely conceiving of a need

(Government solicited information from vendors to use in determining the scope of services that it required). *Distributed Solutions* also had no occasion to consider the distinctions between a procurement and cooperative agreement that Congress mandated in the Federal Grant and Cooperative Agreement Act of 1977 (FGCAA). Reading the Tucker Act in conjunction with 41 U.S.C.A. § 111 and the FGCAA, 31 U.S.C. § 6301-08, which sheds some light on the meaning of "procurement," when an agency initiates a process to determine the needs of a third party as here, the agency is not engaged in a pre-procurement decision at all. *See* 31 U.S.C. §§ 6304(1), 6305(1).

When it enacted the FGCAA, Congress made a clear distinction between "procurement contracts" and other types of Federal assistance relationships, including grants, cooperative agreements, and technology investment agreements, all of which demonstrates that an award of a cooperative agreement is not a procurement. *See* 31 U.S.C. §§ 6303, 6305; *see also, e.g., Comsat Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 271 (4th Cir. 1999) (noting the distinction between "'procurement contracts' and 'cooperative agreements'" under the FGCAA); *Forsham*

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internally. *See id.* at 677-78; *see also Distributed Solutions, Inc. v. United States*, 104 Fed. Cl. 368, 370-74 (2012) (on remand, stressing the formal procurement steps taken by USAID); *Gov't Technical Services LLC v. United States*, 90 Fed. Cl. 522, 528 (2009) (holding that *Distributed Solutions* does not extend bid protest jurisdiction to agency decisions not to exercise options on existing contracts). Here, HUD is simply administering a Congressional mandate as to how to fund PHAs. Indeed, HUD is entering into agreements in its capacity as our sovereign's lead agency for overseeing our nation's public housing portfolio rather than in a proprietary, commercial capacity, where courts usually abstain from entertaining challenges to those agreements pursuant to the Tucker Act. *See Kania v. United States*, 227 Ct. Cl. 458, 650 F.2d 264, 268 (1981) ("The Congress undoubtedly had in mind as the principal class of contract cases in which it consented to be sued, the instances where the sovereign steps off the throne and engages in purchase and sale of goods, lands, and services, transactions such as private parties, individuals or corporations also engage in among themselves.").

v. Harris, 445 U.S. 169, 180 (1980) (highlighting Congress's intent to distinguish between "procurement contracts" and "grant agreements" under the FGCAA).

Specifically, "[a]n executive agency shall use a procurement contract as the legal instrument reflecting a relationship between the United States Government" and a recipient, when "the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit of the United States Government." 31 U.S.C. § 6303; *see also, e.g., New Era Constr. v. United States*, 890 F.2d 1152, 1157 (Fed. Cir. 1989) ("'Procurement' is 'the acquisition by purchase, lease or barter, or property or services for the ***direct benefit or use*** of the Federal Government[.]") (emphasis in original).

By contrast, an agency shall use a cooperative agreement when "the principal purpose of the relationship is to transfer a thing of value" to the recipient, "to carry out a public purpose of support or simulation . . . instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government." 31 U.S.C. § 6305 (emphasis added); *see also, e.g., Rick's Mushroom Service, Inc. v. United States*, 76 Fed. Cl. 250, 258 (2007), *aff'd* 521 F.3d 1338, 1344 (Fed. Cir. 2008) (holding that a cost-sharing agreement between plaintiff and the Government was not a "procurement contract," and that, therefore, jurisdiction was lacking under the Contract Disputes Act, 41 U.S.C. § 609); *see also Institut Pasteur v. United States*, 814 F.2d 624, 628 (Fed. Cir. 1987).

In all cases however, it is of fundamental importance that the Court should look to the agency's enabling statute to decide whether an agency action constitutes a procurement. *See, e.g., 360Training.com, Inc. v. United* States, 104 Fed. Cl. 575, 577 (2012) ("Where an agency,

pursuant to statutory directive, is distributing funds or providing assistance to service providers to ensure a service's availability, it is not conducting a procurement").

In this case, the very purpose of the 1937 Act is "[t]o provide ***financial assistance*** to the States" and their political subdivisions. *See* Pub. L. No. 75-412, 50 Stat. 888, 891 (1937) (emphasis added). Here, under HUD's enabling statute, 42 U.S.C. § 1437 *et seq.*, HUD does not have a statutory mandate to provide a service. Rather, HUD's statutory purpose under Section 8 is to *distribute funds* to PHAs, so that those entities may carry out the public purpose of fostering safe and affordable housing. HUD's award of ACCs, therefore, is not a procurement, but rather HUD acting in its sovereign capacity to manage our nation's housing laws.

II. HUD's Long-Standing Practice Of Awarding ACCs As Cooperative Agreements Is Supported By Statute And Is Reasonable

Although Congress enacted the FGCAA, 31 U.S.C. §§ 6301-6308, to establish criteria for Federal agency use of grants, cooperative agreements, and procurement contracts, the decision as to which legal instrument is appropriate depends, in the initial analysis, on the agency's statutory authority. Once the agency's statutory authority is established, the agency's choice of legal instrument, if rational, should be entitled to deference. We respectfully disagree with the GAO's analysis because it failed to consider HUD's statutory authority.

As we explained above, the FGCAA provides that an agency shall use a procurement contract if "the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government." 31 U.S.C. § 6303(1). In contrast, grants or cooperative agreements *must* be used if "the principal purpose of the relationship is to transfer a thing of value to the State, local government, or other recipient

BID PROTEST

No. 12-852C (Consolidated)
(Honorable Thomas C. Wheeler)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CMS CONTRACT MANAGEMENT SERVICES, et. al.,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
Defendant.

PLAINTIFFS CMS CONTRACT MANAGEMENT SERVICES' AND THE HOUSING AUTHORITY OF THE CITY OF BREMERTON'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND CROSS-MOTION FOR JUDGMENT UPON THE ADMINISTRATIVE RECORD

COLM P. NELSON, WSBA #36735
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
Email: nelco@foster.com
Direct Phone No.: 206-447-6470
Fax: 206-447-1981
Attorney of Record for Plaintiffs CMS Contract Management Services and The Housing Authority of the City of Bremerton

agreement. APPENDIX B, 1981 GAO Report, p. 8. ("This decision must be made for each transaction because procurement authority is available in all assistance programs and any given transaction might be either procurement or assistance."); *See also* APPENDIX C, GOVERNMENT ACCOUNTABILITY OFFICE, INTERPRETATION OF FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977, B-196872-O.M., (p. 5 of 11 of PDF) (March 12, 1980). "[T]he nature of the relationship between a federal agency and another party must be determined by the substance of the agreement judged on the basis of all the surrounding circumstances." *House of Representatives*, B-257430 (1994).

To help understand whether an instrument is a cooperative agreement or procurement contract, the Contract Officer should ask himself or herself whether the agency is "buying" services from an intermediary to relieve its own staff:

> [I]f an agency program contemplates provision of technical advice or services to a specified group of recipients, the agency may provide the advice or services itself or hire an intermediary to do it for the agency. In that case, the proper vehicle to fund the intermediary is a procurement contract. ***The agency is "buying" the services of the intermediary for its own purposes, to relieve the agency of the need to provide the advice or services with its own staff.*** Thus, it is acquiring the services for "the direct benefit or use of the United States Government," which mandates the use of a procurement contract under the Federal Grant and Cooperative Agreement Act.

APPENDIX D, UNITED STATES GENERAL ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, Chapter 10 – Federal Assistance: Grants and Cooperative Agreements, pp. 10-19 to 10-20 (3rd ed. 2006) (updated 2011) (emphasis added).

Here, the record demonstrates that HUD failed to adequately address this question. If it had, it would have concluded, just as GAO concluded, that PHAs are "intermediaries" and HUD

is "buying" their services to relieve HUD of its own obligation to administer these contracts. According to both GAO and HUD, the very reason PHA services were originally acquired was to address "staffing constraints." Since the original 1999 RFP, HUD has continued to publicly claim that it is primarily responsible for performing these services, such as in its Handbook and budget reports, and it is outsourcing those services to free overburdened staff and gain efficiencies. Administrators are a "vital tool" to realize economic savings for HUD.

HUD laid out both "programmatic objectives" and "administrative objectives" in Exhibit A to the PBACC. The objectives relate to the efficient administration of HUD's HAP Contracts. Nowhere in these program objectives does HUD state that the purpose of the PBACCs is to provide assistance for, or otherwise aid, PHAs.

GAO has previously explained that default and termination provisions often highlight the difference between assistance and procurement relationships. APPENDIX B, 1981 GAO Report, pp. 53-54. "In assistance relationships, the Federal Government's and the recipient's interests coincide." *Id.* In procurement situations, however, these sorts of contract terms are necessary in order to protect the Government. *Id.* When a PHA fails to "take appropriate action, to HUD's satisfaction or as required or directed by HUD," HUD may terminate the contract. When an Administrator defaults, HUD has sole discretion in determining default remedies, including the right to take back "any and all Program Property" from the PHA. These stringent contract terms are indicative of a service agreement, not a cooperative agreement.

HUD argues that the principal purpose of PBACCs is to help PHAs carry out their own goals of providing housing for low income families. [81] But as GAO correctly observed, the

[81] HUD relies upon the following provision of the FCAA:

PBACCs do not actually provide assistance to Administrators. Assistance is provided through the HUD-executed HAP Contracts. An Administrator simply forwards on to private owners the assistance at HUD's direction and approval, essentially acting "as an agent" or "tool" of HUD. The PHAs have no right to retain or use the subsidies they are to administer. The subsidies must be immediately transferred to the property owners and any excess funds inadvertently transferred by HUD to the PHA must be remitted back to HUD or invested with HUD requirements.

The fee provided by HUD is unquestionably a "thing of value," but the principal purpose of hiring PHAs and others to administer HUD's HAP Contracts is not to provide them a 2% service fee to carry out their public purpose, it is to relieve HUD's overburdened staff and compensate the PHAs for their services. Indeed, the PBACC specifically states that "the PHA shall use Administrative Fees to pay the operating expenses of the PHA to administer HAP Contracts."

The Senate committee report on legislation that amended the original Federal Grant and Cooperative Agreement Act has also addressed the intermediary issue and is in alignment with GAO's above interpretation:

> The choice of instrument for an intermediary relationship ***depends solely*** on the principal federal purpose in the relationship with the intermediary. The fact that the product or service produced by the intermediary may benefit another party is irrelevant. ***What is important is whether the federal government's principal purpose is to acquire the intermediary's services, which may happen to***

"An executive agency shall use a cooperative agreement . . . when (1) the principal purpose of the relationship is to transfer a thing of value to the State, local government, or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and (2) substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement."

Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. § 6305 (1982).

> ***take the form of producing a product or carrying out a service that is then delivered to an assistance recipient, or if the government's principal purpose is to assist the intermediary to do the same thing.*** Where the recipient of an award is not receiving assistance from the federal agency but is merely used to provide a service to another entity which is eligible for assistance, the proper instrument is a procurement contract.

APPENDIX D, UNITED STATES GENERAL ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, Chapter 10 – Federal Assistance: Grants and Cooperative Agreements, pp. 10-20 to 10-21 (3rd ed. 2006) (updated 2011) (citing S. Rep. No. 97-180, at 3 (1981)) (emphasis added).

Here, the fact that the services provided by PHAs may ultimately benefit recipients is "irrelevant." *Id.* Owners would receive the same assistance through procurement contracts, which have the added benefit to taxpayers of being vetted by competitive bidding. The choice of instrument depends "solely" upon the federal purpose of the contracts, which in this case was to relieve HUD's staffing constraints, not to assist PHAs "do the same thing." These PHAs would not be administering HUD's HAP Contracts if they had not been selected as Administrators. Many (likely most) do not have a single HAP Contract with an owner because the Project-Based program was primarily run by and through HUD.

The GAO Redbook notes that if the program purpose contemplates support to specific intermediaries to provide certain services to third-parties, then the Comptroller General "has approved the agency's choice of a grant rather than a contract." APPENDIX D, UNITED STATES GENERAL ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, Chapter 10 – Federal Assistance: Grants and Cooperative Agreements, pp. 10-20 (3rd ed. 2006) (updated 2011).

HUD misconstrues GAO in arguing that because the "1937 Act specifically indentifies PHAs as a class eligible to receive assistance from the Government" the fact that HUD is legally obligated to pay the property owners is "irrelevant."[82] HUD's analysis is flawed for four reasons. First, FGCAA specifically states that the principal purpose of the instrument, not the program, determines whether an instrument is a contract or cooperative agreement. Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. § 6303 (1982). Even "some aspects of carrying out any assistance program remain primarily procurement in nature." APPENDIX C, GOVERNMENT ACCOUNTABILITY OFFICE, INTERPRETATION OF FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977, B-196872-O.M., (p. 5 of 11 of PDF) (March 12, 1980). Second, if HUD were correct, HUD could use a cooperative agreement to hire any recipient of assistance under the Housing Act to perform any of HUD's non-governmental functions, because that recipient is part of a "class eligible to receive assistance" and the nature of the obligations that entity would be assuming for HUD is "irrelevant." It is precisely this type of overreaching and sweeping misuse of cooperative agreements that the FGCAA sought to curb. APPENDIX B, 1981 GAO Report, p. i (FGCAA sought to "curb the misuse of assistance instruments in procurement situations."). Third, although the Housing Act does provide HAP Contract assistance to PHAs, Congress intended for PHAs to receive such assistance only when they executed HAP Contracts with owners. Thus, even assuming the fee-for-service could be considered "assistance," which it isn't, HUD has no authority under Section (b)(1) or Section (b)(2) to provide assistance to PHAs that did not sign HAP Contracts. Fourth, HUD's own regulations envision any "entity," not just PHAs, bidding for and performing HUD's work as an

[82] Government Brief, pp. 33-4 (citations omitted).

intermediary. The program, therefore, does not contemplate "support to certain types of intermediaries."

GAO's 1981 Report also contains a helpful example of this legal analysis in the context of a dispute with the National Institute of Corrections ("NIC").[83] APPENDIX B, 1981 GAO Report, p. 12. NIC planned to enter into a cooperative agreement, rather than a procurement contract, with an accounting firm to pay its bills. *Id.* at 12-15.

NIC offered three reasons for selecting a cooperative agreement: (1) it would be substantially involved; (2) an internal audit indicated a cooperative agreement would be appropriate; and (3) a contract would not be appropriate because NIC is not the recipient of the services. *Id.* at 13. In reviewing NIC's approach, GAO explained that:

> [T]he choice of instrument for an intermediary relationship depends solely on the Federal purpose in the relationship with the intermediary since it is the recipient of the Federal award. The fact that the product or service produced by the intermediary pursuant to the Federal award may flow to and thus benefit another party is ***irrelevant.*** What is important is whether the Federal Government's purpose as defined by program legislation is to ***acquire*** the intermediary's services, which happen to take the form of producing the product or carrying out the service that is then delivered to the assistance recipient."[84]

Id. at 10 (emphasis added).

Using this standard, GAO concluded that NIC should have used a procurement contract, not a cooperative agreement, to solicit the accounting firm's services. *Id.* at 12.

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[83] NIC's legislative history indicates it fulfills its responsibilities by engaging consultants (public or private) to assist correctional agencies, similar to how HUD engages PHAs.

[84] GAO has also stated that "The agency's relationship with the intermediary should normally be a procurement contract if the intermediary is not itself a member of a class eligible to receive assistance from the government." APPENDIX D, UNITED STATES GENERAL ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, Chapter 10 – Federal Assistance: Grants and Cooperative Agreements, at pp. 10-19 (3rd ed. 2006) (updated 2011). Unfortunately, this language, which HUD relies upon, is not much help to this lawsuit. It is undisputed that PHAs do receive assistance, and the rule does not address what instrument to use when the intermediary does typically receive assistance –it simply provides guidance for when the recipient does not receive assistance.

HUD's NOFA states that it "will consider applications from out-of-State applicants *only* for States for which HUD does not receive an application from a legally qualified in-State applicant." This restriction is a glaring impediment to "full and open competition." HUD has not provided a certification that one of the justifications in § 6.302 applies. HUD has not received approval for any alleged justification under § 6.302 and § 6.304. HUD's failure to do so is a violation of CICA requiring the Court to enjoin all awards under the NOFA.

The NOFA also violates other procedural requirements for federal procurements. For contracts exceeding $25,000, agencies are required to make solicitations and other notices related to the procurement contract available through www.fedbizopps.gov. 48 C.F.R. § 5.101 et seq. This website is the mandated government-wide point of entry. HUD did not provide any publications on the NOFA through the designated website. The NOFA also fails to include certain mandatory contract clauses, which are laid out in FAR. These provisions include, for example: anti-kickback procedures, § 52.203-7; limitation of government liability, § 52.216-24; service of protest, § 52.233-2; or covenant against contingency fees; § 52.203-5. The NOFA's failure to protect HUD through these mandatory provisions is a violation that also supports permanent suspension of all contract awards.

E. Even if PBACCs were Considered Cooperative Agreements, HUD's Decision to Restrict Cross-State Competition was Arbitrary and Capricious.

One of three central goals of the FGCAA is to "promote increased discipline in selecting and using procurement contracts, grant agreements, and cooperative agreements, maximize competition in making procurement contracts, and encourage competition in making grants and cooperative agreements." Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. §

6301(3) (1982). HUD's decision to essentially bar cross-state competition and provide sole-source contracts to HFAs is irreconcilable with the FGCAA's main purpose of encouraging competition for cooperative agreements. HUD has described the existing Administrators as a "vital tool," and even boasts of their success in making HUD a leader in curbing waste. Why, then, prevent these same Administrators from competing for the new PBACCs?

There is little to no explanation for the restriction or preference for in-state applicants in HUD's Administrative Record. The absence of a record is because, according to HUD, "there were not lengthy deliberations on the matter underlying the protests."[86] Without a sufficient record to justify the restriction, HUD is left to argue that the restriction "reduces" the likelihood of "challenges based on State law" so that "the administration of the program can continue to operate without interruption."[87] HUD's justification rests upon what it describes as "numerous" Attorney General opinions ("AG Letters") which argue that out-of-state PHAs are ineligible to operate in their respective as states under their states' laws.[88]

Prior to issuing its NOFA, HUD received ten AG Letters from eight AG offices, most of which reflect a misunderstanding of the project-based housing program.[89] The letters advocate for their clients, state-run HFAs that would prefer and benefit from no competition. HUD did not request or accept legal opinions from other interested parties. When the sole reason for restricting competition is to avoid litigation, HUD's decision to only entertain the perspective of one group of competitors was capricious.

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[86] AR 1151, June 12, 2012 Letter From HUD to GAO.
[87] Government Brief, p. 41.
[88] Government Brief, p. 40-1.
[89] After HUD issued its NOFA it continued to receive AG letters, but its decision to restrict competition could only have been based on the ten letters that pre-dated the NOFA. Notably, of those ten letters, two came from the Oregon Attorney General's Office and two came from the New Mexico's Attorney General's Office. Therefore, HUD really only obtained the opinions of 8 offices for this large procurements.

"Courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking." *Judulang v. Holder*, 132 S.Ct. 476, 484 (2011) (citations omitted) "When reviewing an agency action, we must assess, among other matters, '***whether the decision was based on a consideration of the relevant factors*** and whether there has been a clear error of judgment.' That task involves examining the reasons for agency decisions—or, as the case may be, the absence of such reasons." *Id.* ("emphasis added); *See* APPENDIX G, 73A C.J.S. PUBLIC ADMINISTRATIVE LAW AND PROCEDURE § 392 ("The scope of judicial review may depend on a consideration of various factors such as the ***adequacy of the administrative process by which relevant evidence and facts were obtained***, the nature of the question to be decided, and the subject matter of review, among other things.") (emphasis added).

HUD was aware that many in the industry thought PHAs could operate out-of-state. In response to the 1999 RFP and 2011 ISA, HUD accepted what it describes as reasoned legal opinions from PHAs, explaining why PHAs had authority to operate in the states for which they were submitting applications. HUD found these opinions compelling, as evidenced by its decision to select CMS and others to operate outside their home states. Yet, from the Administrative Record, these reasoned legal opinions played no role in HUD's decision to bar cross-state competition.

The NOFA was prepared because the 2011 ISA was withdrawn as a result of numerous protests, including some arguing that PBACCs must be solicited in accordance with federal procurement regulations, just as CMS argues now. In preparing the NOFA, HUD was aware of these protests, but rather than accept input from PHAs on this and other issues, it is apparent from the Administrative Record that HUD closed its door. Behind that closed door, HUD then

created a competition that not only failed to follow the technical requirements of federal contracting, but violated the spirit of federal procurement and the FGCAA. For a $300 million procurement, administering billions of dollars in assistance, it is outrageous to think that HUD did not engage in "lengthy deliberations" over the use of such drastic competition restrictions, especially after being labeled a "high-risk" agency, vulnerable to "fraud, waste, abuse and mismanagement."[90] From the Administrative Record, HUD did not follow the FGCAA goals or guidance. It engaged in an arbitrary and capricious decision-making process that resulted in a non-permissive restriction on competition.

F. CMS Requests an Award of Its Attorney's Fees and Costs as Provided by Law.

CMS is entitled to costs and fees, including attorney's fees under the Equal Access to Justice Act and will submit supplemental briefing at the appropriate juncture. 28 U.S.C. § 2412(d)(1)(A) (2011).

VII. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss should be denied and judgment upon the Administrative Record should be entered in favor of CMS.

DATED this 18th day of January, 2013.

Respectfully submitted,

s/Colm P. Nelson

Colm P. Nelson, WSBA #36735
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101
Email: nelco@foster.com
Direct Phone No.: 206-447-6470
Fax: 206-447-1981
Attorney of Record for Plaintiffs CMS Contract Management Services and the Housing Authority of the City of Bremerton.

[90] AR 907, 1998 GAO Testimony, p. 1.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Bid Protest

**********	*	Case Nos. 12-852C
CMS CONTRACT MANAGEMENT	*	12-853C
SERVICES, et al.,	*	12-862C
	*	12-864C
Plaintiffs,	*	12-869C
	*	
v.	*	Judge Thomas C. Wheeler
	*	
THE UNITED STATES,	*	
	*	
Defendants.	*	
**********		

PLAINTIFFS AHSC, NTHDC AND CAHI'S CROSS-MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD, AND OPPOSITION TO HUD'S MOTION TO DISMISS AND MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD

ROGERS JOSEPH O'DONNELL

Neil H. O'Donnell
Dennis J. Callahan
Jeffery M. Chiow

311 California Street, 10th Floor
San Francisco, CA 94104
Tele: 415-956-2828
Fax: 415-956-6457
Email: nodonnell@rjo.com

Attorneys for AHSC, NTHDC and CAHI

January 18, 2013

ACCs constitute ACCs under 24 C.F.R. §5.403). Yet, ACCs and P-B ACCs are distinct in important ways.

In the Housing Choice Voucher Program, for example, the PHA is awarded a true ACC, which includes the HAP contract amounts (the rental assistance) and an administrative fee. The PHA has discretion to run their program, including the allocation of rental assistance, largely as it sees fit. It spends the funds to assist the tenants it selects in housing units it approves, within the bounds of HUD oversight. Likewise, Private-Owner/PHA Projects, also funded with true ACCs that include HAP funds and an administrative fee, properly are considered PHA's responsibility due to the authority and discretion accorded the PHA. By contrast, a PBCA that would be selected under this NOFA would serve only as a conduit for the HAP contract amount, holding the funds for less than one business day. It would receive for itself nothing more than the administrative fee as payment for the performance of certain HUD-specified administrative functions with respect to the HAP Contracts assigned to it by HUD. Thus, although HUD has assigned them a similar name, the P-B ACCs that would result from the NOFA are not true ACCs.

E. GAO Correctly Characterized PBCAs As Third-Party Intermediaries

Because it understood that the P-B ACCs under the NOFA were not true ACCs, GAO correctly concluded that the PBCAs are best characterized as the equivalent of third party intermediaries between HUD and beneficiaries of HUD's financial assistance. AR 2850. In its Decision, GAO explained that an "intermediary or third-party situation arises where an assistance relationship ... is authorized to specified recipients, but the Federal grantor delivers the assistance to the authorized recipients by using another party." AR 2847. GAO, citing the GAO Redbook, *360Training* and GAO precedent, observed that a procurement contract is the proper instrument "where the government's principal purpose is to 'acquire' an intermediary's

services, which ultimately may be delivered to an authorized recipient, or if the agency otherwise would have to use its own staff to provide the services offered by the intermediary to the beneficiaries...." AR 2847.

GAO correctly applied the standard, concluding that the P-B ACCs meet both tests. Here, as found by GAO and acknowledged by HUD (HUD MJAR at 42), the low income tenants are the ultimate beneficiaries of HUD's project-based rental assistance, and, were it not for the PBCA initiative, HUD would have to administer the HAP contracts itself. AR 2850.

In its MJAR, HUD contends that GAO's analysis is mistaken, principally because PHAs are eligible to receive grant-type assistance from the government. HUD MJAR at 33. HUD's analysis does not recognize that when acting in the capacity of a PBCA, a PHA is not in the role of a member of a class eligible to receive federal assistance. Rather, a PBCA is paid a fee to provide third-party services for HUD that the Agency otherwise would have to perform itself. Thus, a PHA is the equivalent of a third-party intermediary when acting as a PBCA even though it would not be when, *e.g.*, it is the recipient of a true ACC to fund its own work under the Housing Choice Voucher Program.

F. HUD's Decision To Classify P-B ACCs As Cooperative Agreements Is Not Entitled To Deference

The foregoing analysis conclusively demonstrates that under the FGCAA HUD must use procurement contracts to obtain the PBCAs' services. It is not a close question that the principal purpose of the P-B ACCs is for HUD to obtain services in support of its project-based programs.

HUD's MJAR relies heavily on a flawed view of where deference is owed to its determination that the P-B ACCs are cooperative agreements. *See* HUD MJAR at 26-29. For example, it cites an excerpt from a 1980 GAO decision for the proposition that the FGCAA

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BID PROTEST

CMS CONTRACT MGMT. SVCS., ET AL., **Plaintiff,** **v.** **THE UNITED STATES,** **Defendant.**	**Case No. 12-852C, 12-853C, 12-862C, 12-864C, and 12-869C** **Judge Wheeler**

PLAINTIFF SOUTHWEST HOUSING COMPLIANCE CORPORATION'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD AND PLAINTIFF'S CROSS-MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD

Plaintiff Southwest Housing Compliance Corporation ("SHCC"), through the undersigned counsel, hereby opposes the Defendant's January 4, 2013 motion to dismiss and for judgment on the administrative record, and submits this cross-motion for judgment upon the administrative record.

Richard J. Vacura
MORRISON & FOERSTER LLP
1650 Tysons Blvd., Suite 400
McLean, VA 22102
(703) 760-7764
(703) 760-7349 (fax)

Counsel of Record for Plaintiff Southwest Housing Compliance Corporation

Of Counsel:

Tina D. Reynolds
K. Alyse Latour
MORRISON & FOERSTER LLP

Dated: January 18, 2013

Where, as here, an agency intends to provide assistance to specified recipients by using an intermediary, this Court has noted that the principal purpose of the funding relationship may not always be clear. *360Training.com, Inc. v. U.S.*, 104 Fed. Cl. 575, 580 (2012). In this regard, the *360 Training* Court found that:

> An agency is acquiring the intermediary's services for its own direct benefit or use if the agency otherwise would have to use its own staff to provide to beneficiaries the services offered by the intermediary. *Id.* In other words, if the agency uses an intermediary to provide a service that the agency is required to provide to beneficiaries, then the services are for the agency's benefit. However, an agency is obtaining services for a public purpose if the agency is charged with providing support or assistance to intermediaries as opposed to the final beneficiaries. When an agency supports those intermediaries in providing a service to third parties, an assistance agreement can be the appropriate instrument. *Id.* Thus, a key inquiry is whether the agency's focus is on providing a service to the ultimate beneficiaries or on assisting the intermediaries in providing a service.

Id. (citing GAO Office of General Counsel, Principles of Federal Appropriations Law, Vol. 2, Ch. 10 (3d ed. Feb. 2006). Another way to view the intermediary situation is to state, "[w]here the recipient of an award is not receiving assistance from the federal agency but is merely used to provide a service to another entity which is eligible for assistance, the proper instrument is a procurement contract." S. REP. NO. 97-180, at *5 (1981), 1982 U.S.C.C.A.N. 3; Pub. L. No. 97-162. This is the plainly the case here. The PHA is awarded the ACC, but does not receive assistance from HUD. Instead, the PHA provides the administration services for the HAP contract between HUD and the housing project owner, who is the party eligible to receive the federal assistance. The contract administration services provided by the PHAs directly benefit

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> procurement contracts differ from either grants or cooperative agreements in terms of their basic purpose.

GAO Office of General Counsel, Principals of Federal Appropriations Law (3d Ed. 2006) at 10-15.

HUD by alleviating the need for HUD to perform the primarily ministerial administration functions that accompany the provision of housing assistance to the property owners. Thus, under the principal purpose test of the FGCAA, where the PHAs provide a "direct benefit" to the HUD and act merely as an intermediary to facilitate the process by which HUD provides assistance to eligible recipients, the services must be acquired through a procurement contract.

The Government erroneously posits that "if the Court were determine HUD's award of an ACC is a procurement, the Court will have to first conclude that HUD has the responsibility to administer the HAPs." Govt. MTD at 37. The Government cannot escape the principal purpose test by merely asserting that it is statutorily required to enter into the ACCs with the PHAs. As discussed above and as GAO found, the principal purpose of the ACCs, *as HUD has chosen to structure them*, is to obtain contract administration services from the PHAs. AR at 2849-50. The PHAs merely act as a "conduit" for HUD to provide the housing assistance payments to the property owners.

Despite the Government's attempts to draw attention away from the principal purpose of the ACCs, the true nature of these instruments emerges when comparing the proposed ACCs for the project-based PBCA program at issue here against the ACCs also authorized under Section 8, but for the tenant-based PBCA program (commonly referred to as the "Tenant-Based Rental Assistance Program"). In the Tenant-Based Rental Assistance Program, the PHA plays an essential role in providing assistance to the specified recipients. Critically, the PHA determines which low-income tenants are eligible to receive the housing subsidy under the program, and establishes and enforces the PHA's own policies for the tenants (in accordance with HUD regulations). 24 C.F.R. §§ 982.54(a), 982.157, 982.201. Moreover, once the PHA has awarded a rent payment voucher to a tenant, the PHA also determines whether a unit is eligible under the

B. Even If The Court Finds That The NOFA Is A Cooperative Agreement, The Restrictions Contained In The NOFA Are Unreasonable.

Even if for sake of argument the Court finds it was proper for HUD to use a cooperative agreement to procure the services at issue in this case, the Court clearly has jurisdiction under the Tucker Act to determine whether HUD's actions regarding the NOFA are proper. *360Training.Com v. United States*, 104 Fed. Cl. 575, 577-78 (2012). As described above, PHAs are not themselves authorized to receive assistance under the PBCA Program; HUD is using the PHAs to administer the PBCA program. *See supra* at 10-18. HUD's issuance of the NOFA is therefore a "procurement process" within the meaning of the Tucker Act, and this Court has the authority to consider the propriety of the NOFA.

Pursuant to the FGCAA, all grant and cooperative agreement programs involving discretionary recipients must provide for competition among the prospective recipients whenever possible. *See* 31 U.S.C. § 6301(3) (the Act "promote[s] increased discipline in selecting and using procurement contracts, grant agreements, and cooperative agreements, maximize[s] competition in making procurement contracts, ***and encourage[s] competition in making grants and cooperative agreements***.") (emphasis added).

The NOFA's restrictions on out-of-state PHAs unduly restrict and limit competition in a manner that is inconsistent with the FGCAA. With respect to out-of-state PHAs, the NOFA states:

> HUD will consider applications from out-of-State applicants *only* for States for which HUD does not receive an application from a legally qualified in-State applicant. Receipt by HUD of an application from a legally qualified in-State applicant will result in the rejection of any applications that HUD receives from an out-of-State applicant for that state.

AR at 1261. The NOFA also imposes additional burdens on those PHAs who desire to serve in states other than their home states, including a requirement for the provision of a detailed legal opinion. AR at 1262.[6] Such restrictions were not included in the 1999 RFP that created the initial PBCA contracts. *See generally* AR 428-58. In fact, HUD previously took the position that it wanted only the best value for its money and to obtain a high level of performance on the PBCA contracts.

As justification for the newly-imposed restrictions on out-of-state applicants, the DOJ references letters provided by State Attorneys General. At the time the NOFA was issued, there were only six such letters. Now there are letters from nineteen states. These letters do not provide justification for the restrictions in the NOFA – and certainly provide no justification for the extension of restrictions to states where no opinion has been proffered. The imposition of these restrictions as to all states lacks any reasonable basis and prejudices SHCC.

As an initial matter, it is not settled that HUD must defer to the states in making eligibility determinations as concern PBCA contracts. HUD explicitly acknowledges in the

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[6] The NOFA includes this requirement concerning legal opinions:

> HUD requires that an out-of-State applicant establish not only that the law of the State under which it was created (e.g., State A) authorizes it to operate throughout the entire State in which it proposes to serve as PBCA (e.g., State B)but also that the law of such State (e.g. State B) does not prohibit such an arrangement. HUD also requires that each out-of-State applicant supplement its Reasoned Legal Opinion (RLO) (see definition below) with a Supplemental letter (see definition below) signed by an attorney authorized to practice law in the State for which it applies (e.g., State B) certifying that nothing in the laws of such State in any manner prohibits the applicant, although formed under the laws of a sister State, from acting as a PHA in the State for which it is applying.

AR at 1262. This provision puts an extremely onerous burden on out-of-state applicants.

NOFA that "nothing in the 1937 [Housing] Act prohibits an instrumentality PHA that is 'authorized to engage in or assist in the development or operation of public housing' within the meaning of section 3(b)(6)(A) of the 1937 Act from acting as a PHA in a foreign state." AR 1261. In addition, HUD is in privity of contract with the PHAs. At best what is at issue is a conflict between state and federal law. Principles of federal supremacy and pre-emption dictate that federal law trump state law in this situation. *See, generally, Altria Group v. Good*, 555 U.S. 70 (2008).

Second, even if the State AG letters were to be given any deference, an examination of the letters themselves[7] indicate that the nineteen states that submitted letters did not unequivocally take the position that "out-of-state PHAs could not lawfully operate within their own state" as the Government claims. Govt. MTD at 41. For example, the letter from the California AG states: "Although *there is no case or statute precisely on point*, our review of the relevant authorities leads us to conclude that a local housing authority *likely* lacks the necessary legal authority to operate statewide."[8] The August 4, 2011 Connecticut AG letter says that "an instrumentality of an out of state public housing authority may not act as a public housing authority in Connecticut, *without first being authorized to do so according to Connecticut law*.").[9] The Illinois AG letter includes this sentence: "Although the State Housing Act and the Housing Authorities Act do not contemplate an out-of-state agency or instrumentality serving as a public housing agency in Illinois, it might be possible for such an entity to do so pursuant to the

[7] The letters are available at: http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/PBCA%20NOFA.

[8] http://portal.hud.gov/hudportal/documents/huddoc?id=CAtoAG.pdf at 1 (emphasis added).

[9] http://portal.hud.gov/hudportal/documents/huddoc?id=CTtoAG.PDF at 1 (emphasis added).

provisions of the Intergovernmental Cooperation Act."[10]

Even more egregiously, the letter from the Arizona AG is not based upon state law, but upon that state's interpretation of HUD regulations. ("This letter does not represent the formal or informal opinion of the Arizona Attorney General. . . . The Department believes that HUD's own codes, regulations and handbook do not permit giving a Section 8 PBCA contract to an out-of-state entity. . . ."). [11] The State of South Carolina goes one step further, concluding in its letter that "while we may offer an opinion as to the jurisdiction of housing authorities under State law, we believe that HUD is in a better position to decide whether or not a housing authority may be considered under the Invitation."[12] As the South Carolina AG seemed to acknowledge, HUD cannot rely upon *state* attorney generals to interpret applicable *federal* statutes and implementing regulations.

Third, even if these AG letters did demonstrate that the NOFA's restrictions are appropriate in these nineteen states, the existence of these letters cannot justify the imposition of these same restrictions in the remaining twenty-three states under the NOFA. HUD has absolutely no basis to believe that these restrictions are legally necessary in the remaining states, and has undertaken no analysis to make this determination. It is per se unreasonable for HUD to impose a blanket restriction on competition in all NOFA states based on letters from a few states (six at the time the NOFA was issued). Since the record is not sufficiently developed to say that the restriction of competition in all states is reasonable, the blanket imposition of this restriction is arbitrary, capricious, and unsupported by law. Likewise, the requirement in the NOFA that

[10] http://portal.hud.gov/hudportal/documents/huddoc?id=ILtoAG.pdf at 1. The Illinois Attorney General letter is also not a formal opinion. *Id.* ("Because of the nature of your inquiry, I do not believe that issuance of an official opinion of the Attorney General is appropriate.").

[11] http://portal.hud.gov/hudportal/documents/huddoc?id=AZtoAG.PDF at 1.

[12] http://portal.hud.gov/hudportal/documents/huddoc?id=SCtoAG.PDF at 4.

requires out-of-state PHAs to obtain legal opinions, which is not required for in-state PHAs, lacks any rational basis.

SHCC is undeniably prejudiced by these improper restrictions. SHCC is presently the incumbent contractor for the state of Arkansas, with an excellent performance record, yet it has lost the opportunity to compete in a fair and open competition in Arkansas. HUD has no letter from the State of Arkansas that says SHCC, or any other out-of-state PHA, may not compete there. The restrictions in the NOFA that prohibit SHCC from obtaining a cooperative agreement to administer the Arkansas contract, or any other out-of-state contract, lack reasonable basis and cannot be permitted to stand.

C. SHCC Is Entitled To Declaratory And Injunctive Relief.

This Court "may award any relief that [it] considers proper, including declaratory and injunctive relief" to correct a defective solicitation. 28 U.S.C. § 1491(b)(2). To be entitled to permanent injunctive relief a plaintiff much demonstrate: (1) success on the merits; (2) that it will suffer irreparable harm if injunctive relief is not granted; (3) that the benefit of the relief outweighs any harm to the Government if an injunction is granted; and (4) the injunction is not against the public interest. *PGBA, LLC v. United States*, 389 F.3d 1219, 1228-29 (Fed. Cir. 2004) (citing *Amoco Prod. Co. v. Vill. of Gambell, Alaska,* 480 U.S. 531, 546 n. 12 (1987)).

As concerns success on the merits, we have demonstrated above that the PBCA services HUD seeks should be obtained through procurement contracts rather than cooperative agreements. In the alternative, in the event the Court finds that PHA services may be obtained through a cooperative agreement, we have shown that the cooperative agreements contemplated here are unduly restrictive, in violation of the FGCAA.

SHCC will suffer irreparable harm if injunctive relief is not granted. As an out-of-state

BID PROTEST

No. 12-852C (Consolidated)
(Honorable Thomas C. Wheeler)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CMS CONTRACT MANAGEMENT SERVICES, et. al.,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
Defendant.

PLAINTIFFS CMS CONTRACT MANAGEMENT SERVICES' AND THE HOUSING AUTHORITY OF THE CITY OF BREMERTON'S MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD

COLM P. NELSON, WSBA #36735
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
(206) 447-4400
Attorney of Record for Plaintiffs CMS Contract Management Services and The Housing Authority of the City of Bremerton

- Amendment Funding Actions: Amendment funding actions are in processing for 274 HAP contracts in their original contract term. All of these contracts need budget authority increases to clear vouchers processed in TRACS as of November 6, 2007. As of that date, however, vouchers on hand included only a few subsidy vouchers for the month of December 2007.

  Based on projections of December vouchers, many other contracts in their original contract term will require a budget authority amendment for payment of the December vouchers. All of these projected increases could not be funded from the limited amount of amendment funds available under the first CR. Therefore, shortfalls will be calculated against actual December voucher amounts as December vouchers are submitted, and shortfalls funded on a first-come first-served basis.

2nd Continuing Resolution through December 16, 2007

- An additional $678 million for HAP contract renewals under the FY 2008 2nd CR. Secondary funding actions will be processed immediately from funds available under the 2nd CR in order to extend these one and two-month funding amounts through the end of the calendar year (i.e., December 31, 2007) and provide funding for HAP contract renewals effective December 31st thru January 31st.

2. Change in HAP Renewal Processing Instructions

The attorneys for the Chief Financial Officer has determine HUD MUST sign all HAP contract renewals because the contracts represent the official point of obligation of federal funds; consequently, effectively, immediately, all contract renewals must sent to the HUD field office for final execution – prior to being sent to the Fort Worth Accounting Center (FWAC).

3. TCA HAP Contract Transfers to HUD and PBCA

This TCA assignment round will not take into consideration the entire TCA portfolio, this will occur at a later date. However, what this assignment round will cover are two categories of TCA contracts (1) those TCA contracts that had requested an exemption from the July 1, 2007 conversion and were later notified that the Department would move forward with the conversion and these would be assigned January 1, 2008 and (2) TCAs that requested termination of the ACC and assignment of the HAP contract to the PBCA as a result of the conversion activity and were advised that the contracts could be considered in the next contract assignment round effective January 1, 2008. What is the background on the TCAs and the two contracts below regarding assignment status activity July 1, 2007?

RhodeIslandHousing
working together to bring you home

VIA ELECTRONIC MAIL AND HAND DELIVERY

Office of the General Counsel
United States Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548
protests@gao.gov
Attn: James Spangenberg, Assistant General Counsel
John Formica, Senior Attorney

Re Protests of: Rhode Island Housing and Mortgage Finance Corporation, B-405341.1, B-405341.2 (supplemental protest)

Dear Messrs. Spangenberg and Formica:

On July 11, 2011 Rhode Island Housing and Mortgage Finance Corporation ("Rhode Island Housing") filed a protest (the "Protest") to the determination of the U.S. Department of Housing and Urban Development ("HUD") to select Jefferson County Assisted Housing Corporation ("JCAHC") as the Performance Based Contract Administrator for the State of Rhode Island. On July 21, 2011, HUD filed a letter (the "HUD Letter") requesting that the United States Government Accountability Office ("GAO") dismiss the Protest, on the grounds that (1) the GAO does not have jurisdiction to hear the Protest and (2) the Protest is untimely. Each of these objections is meritless and should be rejected. For the reasons set forth below, the GAO has jurisdiction to consider Rhode Island Housing's bid Protest and the Protest was timely filed.

DISCUSSION

I. BACKGROUND OF THE SECTION 8 PROGRAM

A. The Original Section 8 Program Organization. The Section 8 rental assistance program was created in 1974, when Congress adopted Section 8 of the United States Housing Act of 1937. The Section 8 program provides rent subsidy payments, either to owners of multifamily housing ("project-based Section 8") or to tenants (through vouchers or certificates). To carry out the project-based program, HUD or local public housing agencies ("PHAs") entered into Housing Assistance Payments Contracts ("HAP Contracts") with multifamily development owners. PHAs that entered into HAP Contracts then entered into Annual Contributions Contracts ("ACCs") with HUD, through which the PHAs received funds to pay amounts due to owners under the HAP Contracts. At the outset of the Section 8 program, a PHA would enter into a separate ACC for each HAP Contract that it executed. In addition to supplying a source of funds for HAP Contract payments, the ACC required the PHA to service and administer the HAP Contract, including overseeing tenant selection and rent adjustment activities, a function referred to as contract administration. *See, e.g.*, 24 C.F.R. § 880.505 (April 1, 1981). For projects developed between HUD and the project owner, without PHA involvement, the contract administration function was carried out by HUD. *Id.*

At its inception the project-based Section 8 program essentially was a housing production program. HUD offered project-based rental assistance in connection with new

construction or substantial rehabilitation of developments. However, in 1983, Congress eliminated funding for new development and since then the program has supported existing properties. *See* Renewal of Section 8 Project-Based Rental Assistance, http://portal.hud.gov/hudportal/HUD?src=/hudprograms/rs8pbra (last visited July 29, 2011).

B. HUD Outsources Section 8 Program Contract Administration. As the project-based Section 8 program shifted from production to support of existing properties, HUD implemented changes to reflect this reality and increase efficiencies. As part of these changes, in 1999 HUD issued a Request for Proposals (the "1999 RFP") that sought to consolidate Section 8 rent adjustment administration in a single PHA engaged by HUD as the "Performance Based Contract Administrator" ("PBCA") for each state. "Request for Proposals; Contract Administrators for Project Based Section 8 Housing Assistance Payments (HAP Contracts)," 64 Fed. Reg. 27,358 (May 19, 1999).

Initially, these PBCAs were to be responsible for the contract administration of those 20,000 projects for which HUD was at that time responsible for providing contract administration functions. *Id.* HUD stated that it expected to transfer contract administration of HAP Contracts administered by PHAs over to PBCAs on a rolling basis, as those contracts expired and were renewed. *Id.* Pursuant to these modifications, rather than enter into a separate ACC for each HAP Contract, the PBCA was to enter into a single ACC with HUD, which would identify all the HAP Contracts in the jurisdiction for which

the PBCA was responsible, *see id.* at 27,359, and would outline the specific "performance-based tasks" ("PBTs") that the PBCA was responsible for performing in the course of administering the subject HAP Contracts. *See id.* at 27,360 – 27,365.

Following the 1999 outsourcing, the ACCs continued to serve as the legal mechanism whereby HUD funds were allocated to PHAs to make payments due under their HAP Contracts; however, in substance they became contracts under which PBCAs agreed to provide management services to HUD to oversee compliance by development owners with the requirements of the Section 8 program. Indeed, HUD specifically stated one of its goals in the 1999 RFP was to "[e]xecute ACCs only with entities that have the qualifications and expertise necessary to oversee and manage affordable housing and that have the capacity to perform the required services. . ." *Id.* at 27,358. Thus, the primary task of each "Performance Based Contract Administrator" was to assure the efficient operation of the Section 8 program.

The nature of the relationship between HUD and the PBCAs was recognized by HUD's Office of Inspector General ("OIG") in a 2009 audit of the PBCA program (the "OIG Audit"). *See* OIG Audit Report, Audit Report Number 2010-LA-0001, http://www.hudoig.gov/pdf/Internal/2009/ig1090001.pdf (last visited July 29, 2011). OIG correctly characterized the PBCA program as creating a series of service contract between HUD and the selected PHAs. OIG explained that "HUD entered into performance-based contracts" – that is, the ACCs –"because of a government-wide

emphasis for ***service contracts*** to be performance based." OIG Audit at 4 (emphasis added). The OIG Audit identified 10 "core tasks" performed by the PBCAs on HUD's behalf and explained "there are 16 incentive-based performance standards" for each PBCA. *Id.* at 4-5. OIG noted that the effect of the PBCA program was to shift contract management tasks from HUD to the PBCAs, explaining that "[b]efore the contract award, HUD was the contract administrator and was required to monitor the Section 8 housing assistance payments contracts." *Id.* at 13.

As these examples indicate, HUD's OIG recognized the PBCA program for what it was – an attempt by HUD to outsource its contract management services to achieve greater efficiencies. Essentially, by entering into ACCs with the PBCAs, HUD was hiring the PBCAs to manage its Section 8 portfolio.

C. **The 2011 Invitation for Submissions.** The Invitation For Submission of Applications: Contract Administrators for Project-Based Section 8 Housing Assistance Payments (HAP) Contracts ("Invitation") is the mechanism that HUD developed to select PBCAs to operate the Section 8 program going forward from 2011. *See* Invitation For Submission of Applications: Contract Administrators for Project-Based Section 8 Housing Assistance Payments (HAP) Contracts, http://portal.hud.gov/hudportal/documents/huddoc?id=invitationforappsfinal.pdf (last visited July 29, 2011). The Invitation reflects a competitive process whereby PHAs would make bids to provide PBCA services to HUD.

Like the 1999 RFP, this approach differs from the original method of operating the Section 8 program in several respects. First, consistent with the 1999 RFP model, the PBCA would administer the state Section 8 program through a single "master" ACC for the entire state. *See* Invitation at 3. Second, PHAs were allowed to apply for PBCA assignments outside the state where they were originally chartered or incorporated. *See id.* at 5 ("If the applicant proposes to serve as PBCA in a State other than the State under the laws of which it was formed. . ."). Third, as the name implies, PBCAs would provide services on "performance-based" terms and would only receive payment from HUD in return for services provided in accordance with the ACC. *See* Performance-Based Annual Contributions Contract (ACC) dated June 22, 2011, available at http://portal.hud.gov/hudportal/documents/huddoc?id=accfinal.pdf, at Ex. A, Section 3 (last accessed July 29, 2011).

Finally, PHAs could team with private sector firms – for-profit and nonprofit entities – who presumably could add value to their proposal. *Id.* at 3 ("HUD will consider Applications submitted by joint ventures and other public/private partnerships. . ."). HUD states among its objectives that such joint enterprises would allow HUD to "***obtain the benefit*** of the best practices of both public and private sectors." *Id.* at 4 (emphasis added).

HUD again specifically stated that one of its objectives for the Invitation was to "[e]xecute an ACC only with a PHA that has the qualifications and expertise to oversee and

manage affordable housing, and that has the capacity . . . to perform the required contract administration services." *Id.*

The Invitation was issued on February 25, 2011. On April 27, 2011, Rhode Island Housing submitted its application to HUD to serve as the PBCA for the State of Rhode Island. On July 1, 2011, HUD notified Rhode Island Housing that JCAHC had been selected as the PBCA for Rhode Island. On July 11, 2011, Rhode Island Housing submitted its timely Protest of that selection to GAO.

ARGUMENT

I. BECAUSE THE INVITATION WAS A PROCUREMENT FOR A CONTRACT TO PROVIDE SERVICES TO HUD, GAO HAS JURISDICTION

A. The ACCs Envisioned by the Invitation Provide Contract Management Services to HUD.

HUD's first argument is that the Invitation constituted a request to enter into a grant or cooperative agreement with HUD over which GAO has no jurisdiction. This argument is without merit.

GAO has jurisdiction over protests relating to an alleged violation of a "procurement statute or regulation" by a Federal agency in the award or proposed award of contracts for the "procurement of property or services." 31 U.S.C. §§ 3551(1) and 3552(a).[1]

[1] The HUD Letter (at 4) incorrectly states that GAO has no "protest jurisdiction over the award of non-procurement instruments, such as grants and cooperative agreements." On the contrary, GAO has authority to determine that a Federal agency has violated Federal law by masking a procurement as a proposal to enter into a grant or cooperative agreement. *Sprint Communications Co., L.P.*, B-256586 (May 9, 1994) (GAO will review " a timely protest that an agency is improperly using a cooperative

Indeed, as the HUD Letter admits, the Federal Grant and Cooperative Agreement Act of 1977 ("FGCA") directs the Government to enter into a procurement contract where the "principal purpose of the instrument is to acquire (by purchase, lease or barter) property or services for the direct benefit or use of the United States Government." *See* 31 U.S.C. § 6303(1); *see also* HUD Letter at 4.

> On the other hand, a grant or cooperative agreement should be used where:
>
> (1) the principal purpose of the relationship is to transfer a thing of value to the State or local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease or barter) property or services for the direct benefit or use of the United States Government.

31 U.S.C. §§ 6304(1) and 6305(1).[2] Based on these distinctions, HUD contends that "the ACCs between HUD and the PHAs are not procurement contracts since the arrangement is not designed to meet HUD's immediate needs, but rather, to assist the PHAs to carry out their contract administration functions assigned to them by statute in order to promote their public purpose of affordable housing." HUD Letter at 5.

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agreement, where under the [FGCA] a 'procurement contract' is required, to ensure that an agency is not using a cooperative agreement to avoid the reui4erdmnets of procurement statutes and regulations."). The fact that HUD now, in a post hoc rationalization, claims that the ACCs are actually cooperative agreements does not itself deprive GAO of jurisdiction here.

[2] The quoted description in paragraph (1) is the same for both grants and cooperative agreements. The principal difference is that a grant does not usually involve substantial participation by the Federal agency. 31 U.S.C. § 6304(2). Cooperative agreements are used when "substantial involvement" is expected. 31 U.S.C. § 6305(2).

HUD's characterization of the ACCs is fundamentally flawed, and is inconsistent with the governing law, the history of the PBCA program, and the express terms of the Invitation. HUD's position should be rejected by GAO.

1. The PBCA program is intended to outsource HUD's own Section 8 contract administration system.

The ACCs originally functioned as a funding mechanism, under which HUD funds flowed through PHAs to fund Section 8 rental assistance payments to owners. Contrary to the arguments presented in the HUD Letter, the PBCA program, initiated in 1999 and continued in the Invitation, was not intended as a mechanism to assist PHAs in carrying out their "public purpose." *See* HUD Letter at 5-6. Rather, as both the 1999 RFP and the OIG Audit make clear, the purpose of the PBCA program was to outsource HUD's contract administration services. In other words, in entering into ACCs, HUD was hiring contractors – PHAs and other private joint venturers – to perform contract administration functions that it no longer wished to perform for itself. This satisfies the test for a procurement contract under 31 U.S.C. § 6303 because, upon the adoption of the PBCA model, the principal purpose of the ACC has been to acquire a suite of administrative services for the direct benefit or use of the United States Government. The ACCs are contracts whereby the PBCAs, for a fee, perform contract administration services for HUD. As such, they are procurement contracts that are subject to GAO's bid protest jurisdiction.

2. The ACCs are principally intended to provide contract management services to HUD.

The terms of the Invitation further demonstrates that the ACC is no mere conduit for HUD funds but has become essentially a sophisticated contract management agreement between HUD and the selected PBCA. According to the Introduction to the Invitation, the purpose of this competition was to identify PHAs that would enter into "a single Performance-Based [ACC] with HUD . . . to administer HAP Contracts with owners of Section 8 projects in the State." *See* Invitation at 3. The Introduction lists a number of HUD's "programmatic objectives" (such as calculating and paying Section 8 subsidies "correctly") and "administrative objectives" (such as executing "an ACC only with a PHA that has the qualifications and expertise to oversee and manage affordable housing. . ."). *Id.* Section 2 of the Invitation – "Overview of Contract Administrator's Responsibilities" – specifies additional tasks that the PHAs will perform. Among other things, the selected PBCA will:

- "[A]dminister the HAP Contracts that HUD assigns during the ACC term";
- "[E]nter into a renewal contract with Section 8 owners. . . ";
- "[M]onitor each property owner and ensure compliance with the terms of the HAP Contract";
- "[C]omply, and will ensure compliance by owners, with Federal law, HUD implementing regulations, the Section 8 Renewal Guide, and all other requirements and guidance that HUD deems applicable . . . ";
- "Monitor[] compliance by project owners with their obligations to provide decent safe, and sanitary housing to assisted residents";
- "Pay[] property owners accurately and timely";
- "Accurately and timely submit[] required documents to HUD (or a HUD designated agent)"; and

- "Comply[] with applicable Federal law and HUD regulations and requirements.

This is only a partial list of obligations a PBCA must accept when they enter into an ACC with HUD. According to the Invitation and the ACC, PHAs must perform eight core Performance Based Tasks ("PBTs"), such as conducting management and occupancy reviews, adjusting contracts rents, and reviewing and paying monthly vouchers, the elements of which are described in great detail in the ACC. *See* Invitation at 4; ACC at Ex. A.

As this litany demonstrates, the proposed ACCs go far beyond a grant or cooperative agreement that "carr[ies] out a public purpose of support or stimulation authorized by a law of the United States." 31 U.S.C. § 6304(1). HUD contends that various authorities have concluded that ACCs were not contracts for providing goods and services to the Federal Government (*see* HUD Letter at 6). However, HUD does not make reference the type of contracts described in the Invitation. As the above-referenced list of PHA duties makes clear, the ACC does not function as a traditional contribution agreement, rather as a complex contract administration or management agreement. The goals identified in the Invitation are not intended to guide the PHAs to carry out their own obligations more efficiently; rather, they are intended to guide HUD in identifying PHAs who can carry out ***HUD's oversight responsibilities*** more efficiently. The PHAs thus provide services to HUD under ACCs, which cannot fairly be characterized as grants or cooperative

agreements. Rather, ACCs govern the provision of a suite of contract management services to HUD, and therefore are subject to GAO's bid protest jurisdiction.[3]

B. Other Structural Changes to the PBCA Program Confirm that the ACCs are Procurement Contracts.

As the preceding analysis demonstrates, the adoption of the PBCA system in 1999 fundamentally altered the relationship between HUD and the PHAs. In addition to articulating the PBCA role and assigning to the PBCA more extensive contract management duties than under prior iterations of the program, HUD made other changes to Section 8 that underscore the notion that ACCs are procurement contracts, rather than grants or cooperative agreements.

1. Under the ACCs, PBCAs Will Undertake "Performance-Based Tasks."

In its attempt to cast the ACC as a form of grant or cooperative agreement, HUD insists that the ACC is essentially a mechanism for providing assistance to local PHAs in

[3] HUD cites three 1980s cases for the proposition that the GAO has recognized that in the context of ACC transactions relating to HUD housing programs, PHAs hold a status akin to federal grantees. HUD Letter at 6. However, the cases cited by HUD are inapposite for at least three reasons. First, each of the cases are obsolete, because they are based on the model that existed before HUD adopted the PBCA program in the 1999 RFP, which converted the ACCs into contract management agreements to service the Section 8 portfolio. As explained herein, PHAs can no longer be viewed as federal grantees in light of these changes. Second, none of the cases cited by HUD involved the question of whether the GAO has jurisdiction over procurements conducted by HUD. Instead, the cases focused on awards made and procurements conducted by the PHA; hence, the cases do not present a situation when the GAO is being asked to review a contract entered into by the federal government. Finally, in each of the cases, the GAO in fact held that it had jurisdiction to consider the protest, relying on its authority to "review the propriety of contract awards made by grantees to insure that Federal agencies are requiring their grantee, in awarding contracts, to comply with any applicable Federal legal requirements, including the grant agreement." *See Ed Davis Construction, Inc.*, B-216353, 1985 85-1 CPD P226 (Feb. 22, 1985); *Guarantee Electrical Company*, B-201697, 1983 83-1 CPD P276 (March 18, 1983); *Linde Construction-Reconsideration*, B-206442, B-206442.2, 83-2 CPD P85 (July 13, 1983).

furtherance of their mission to provide affordable housing. HUD Letter at 5. Under this view, the PHAs receive a modest fee for serving as conduits for HUD's Section 8 rental assistance funds. *Id.* at 3. However, the terms of the ACC and the HUD Letter demonstrate that the relationship between HUD and the PHAs is much more complicated than this. As the HUD Letter candidly acknowledges, since 1999 HUD has endeavored to change "the structure of the ACC into a 'performance based' contract, where the administrative fee provided to the PHAs for performing their statutorily-authorized function would be based upon the PHA's performance." *See* HUD Letter at 4. In the post-1999 world, the ACCs are major contract management agreements, for which PHAs compete to demonstrate their particular expertise and experience. HUD's demand for such expert performance is at odds with its attempt to characterize PHAs as providers of mere conduit services. The goal of the competition under the Invitation is clearly to allow HUD to delegate its contract administration functions to the bidders who offer the best total value, in terms of technical skill, experience and efficiency.

2. HUD Cannot Rely On PHAs' "Public Purpose" To Support Its Contention That The ACC Is A Grant, Where It Has Authorized Joint Ventures With Private Sector Entities.

Central to HUD's argument is that the ACCs merely allow PHAs to carry out their "public purpose." HUD Letter at 5. Whether or not that was correct under the Section 8 program as originally enacted, HUD can no longer contend that the primary purpose of the ACCs is to carry out the public purpose of the PHAs. Since the adoption of the PBCA

system in 1999, non-PHAs, including purely private organizations with no public purposes whatsoever, are permitted to materially participate in and benefit from the ACCs. As set forth in the Invitation, "HUD will consider Applications submitted by joint ventures and other public/private partnerships between PHAs and other public or private for profit or non profit entities." Invitation at 3.

This arrangement is at odds with the definition of a grant, which requires that the "principal purpose" of an instrument must be "to transfer a thing of value to the State or local government or other recipient to carry out a public purpose." *See* 31 U.S.C. § 6304(1). The Section 8 statute recognizes no such "public purpose" for for-profit or non-profit entities to carry out the duties of a PHA under an ACC. On the contrary, the Section 8 statute invites only "states and political subdivisions of States to remedy unsafe housing conditions" and "to address the shortage of [affordable] housing." 42 U.S.C. § 1437(a)(1)(A) and (B); HUD Letter at 2.

There may be many good reasons why non-PHAs should be involved in providing PBCA services to HUD – greater entrepreneurial skills, deeper financial resources, etc. – but it cannot be said that the Invitation is assisting them in carrying out a mission statutorily committed to the PHAs. The introduction of private sector firms in the PBCA system underscores the reality that Invitation is for services to benefit HUD, and therefore it must follow Federal procurement rules. However, even absent the finding of a direct benefit to HUD, GAO would still have jurisdiction over Rhode Island Housing's Protest. In *Spectrum*

Analysis & Frequency Engineering, the Comptroller General pointed out that the Competition in Contracting Act, under which the GAO is authorized to decide bid protests, defines a protest as a "written objection by an interested party to a solicitation by a federal agency for bids of proposals on a proposed contract for the procurement of property or services." Critically, "the existence of some direct contractual benefit to the government... is not set forth in [the Competition in Contracting Act] as a prerequisite to [GAO] assuming jurisdiction of a protest." *See* Spectrum Analysis & Frequency Engineering, B-222635, Oct. 8, 1986, 86-2 CPD 406 (emphasis added).

3. To The Extent That The ACC Authorizes PHAs To Enter Into ACCs Outside The State That Created Them, They Do Not Possess The "Public Purpose" To Support A Grant Analysis Here.

As the Invitation explains, a PHA "is a creature of State law," and the Invitation goes on at length to describe the sort of legal evidence a PHA must provide to show that it is qualified to conduct business outside the state in which it was organized. *See* Invitation at 5 *et seq.* Undoubtedly, PHAs can carry out tasks in other states. But it is hard to see how HUD can maintain that entering into an ACC with a PHA created in another state furthers the PHA's "public purpose" of creating more affordable housing. The express purpose of the Invitation is to identify PBCAs "to administer the Project-Based Section 8 Housing Assistance Payments (HAP) Contracts." Invitation at 3. The ACC is a service contract used by HUD to increase the efficiency of Section 8 program management; its "principal

purpose" is not to assist the PHA "to carry out a public purpose." As such, the GAO has jurisdiction of the Protest.

C. To The Extent That The ACC Has "Mixed" Purposes the GAO Has Jurisdiction Over the Protest.

To the extent the GAO concludes that the ACC has "mixed" purposes – that it involves both transfer of HUD funds and contract administration for HUD – it should still assert jurisdiction over the Protest since one of the ACC's principal purposes is the "acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government." 31 U.S.C. § 3603. The GAO has jurisdiction to review protests concerning the "procurement of property or services" even if elements of the transaction do not constitute a classic "procurement." For example, the GAO will assert jurisdiction over a mixed transaction (elements of which do not involve procurement) so long as the procurement-related activities "to be received by the government were one of the transaction's main objectives." *In re Starfleet Marine Transp.*, B-290181, 2002 Comp. Gen. Proc. Dec. P113 (July 5, 2002). Such mixed purpose transactions fall within the GAO's protest jurisdiction if the thrust of the transaction is a procurement-related transaction. *E.g.*, *In re Gov't of Harford County*, B-283259; B-283259.3, 99-2 Comp. Gen. Proc. Dec. P81 (October 28, 1999) ("Because one of the main objectives of the RFP was to obtain water and wastewater services, we conclude that we have jurisdiction to hear the protest.")

For example, the GAO has considered a challenge to an agency's award of a cooperative agreement where there is a showing that the agency's main objective was in fact

to procure goods or services. *In Re Ship Analytics, Inc. District 2; Marine Engineers Beneficial Association—Reconsideration*, B-227084.3, B-227084.4, 1987 U.S. Comp. Gen. LEXIS 74; 87-2 Comp. Gen. Proc. Dec. P590 (December 15, 1987) (reviewing merits after concluding that the fundamental nature of the relationship between the agency and the awardee is that a facility will be operated for the agency by the awardee principally to serve the needs of the agency and concluding that "the proper instrument for this type of relationship is a contract and not a cooperative agreement.")

Here, the main objective of the transaction is procurement-related. As discussed above, the ACC is now a service contract used by HUD to increase the effectiveness of Section 8 program management. Ignoring that reality, the HUD Letter (at 8) asserts that the ACC is principally intended to provide support for the PHA's "public purpose." Even a cursory reading of the Invitation and the ACC belies that assertion – this is a solicitation for services to benefit HUD. At the very least the ACCs are mixed contracts that provide benefits to HUD, and therefore the GAO has jurisdiction over the Protest.

D. <u>Because HUD Decided To Conduct A Procurement, It Is Foreclosed From Now Arguing That It Awarded A Grant Or Cooperative Agreement</u>.

While constructing a misleading description of the purpose and goals of the ACC, the HUD Letter all but ignores HUD's actual conduct in issuing the Invitation and selecting PBCAs. In fact, the selection of PBCAs pursuant to the Invitation was, for all intents and purposes, conducted as a procurement and HUD cannot now argue it was something else.

The FGCA expressly acknowledges this, saying that a procurement contract must be used if "the agency decides in a specific instance that the use of a procurement contract is appropriate."[4] 31 U.S.C. § 6303(2). In other words, if an agency elects to conduct a procurement, then it is foreclosed from arguing post-hoc that the procurement was in fact a cooperative agreement or a grant. *Id.*; *cf. Maximus*, B-195806, 1981 U.S. Comp. Gen. LEXIS 1998 (April 15, 1981) (stating that the National Endowment of Art's solicitation for a cooperative agreement to develop and test models for audience surveys to be conducted by art and cultural institutions "arguably involves a procurement" because it was conducted as such: the "solicitation document indicated that a contract could be awarded in lieu of a cooperative agreement, invited firms to submit 'proposals,' and provided that a single awardee would be selected by applying listed evaluation criteria.") What transpired here in fact essentially involved a procurement, not an assistance matter, and was conducted by HUD as such.

HUD's Invitation included the three major sections of a procurement-style Request For Proposal ("RFP"): specifications describing the required work (Part 2), instructions to offerors regarding what information offerors should provide in their proposals (Part 3), and

[4] HUD argues that "[i]t is the nature of the relationship between HUD and the PHA that determines whether the ACC is a procurement contract, not the process by which PHAs were selected. HUD Letter at 7. This may be true if HUD decides to use a grant process or a cooperative agreement process to make an award. Under that circumstance, the legal instrument may still be viewed as a procurement contract even if HUD tried to award a grant or a cooperative agreement. However, if HUD decides that the use of a procurement contract is appropriate and then post-hoc tries to characterize the procurement as a grant or cooperative agreement, then the procurement "process" adopted by HUD is determinative since the FGCA specifically states that agencies are required to use a procurement contract if they "decide[] in a specific instance that the use of a procurement contract is appropriate." 31 U.S.C. § 6303(2).

evaluation criteria describing how the government will evaluate proposals (Part 4). *See* Invitation at 2. HUD's evaluation criteria listed the significant factors and subfactors that HUD reasonably expected to consider in evaluating the proposals and the relative importance of each factor and subfactor. *Id.* at 18-22. The Invitation set a deadline for the submission of proposals. *Id.* at 18. HUD did not publicly open the bids it received. The Invitation indicated that additional guidance may be provided to interested persons and indeed, extensive Q&A-type guidance was posted by HUD in response to questions it received. *See* Invitation at 22; HUD Letter, Exhibit 2. HUD issued a postaward notice to Rhode Island Housing that it was an unsuccessful offeror. In its postaward notice, HUD also offered Rhode Island Housing an opportunity for a postaward debriefing conference call. HUD conducted a debriefing. Thus, HUD's procedures bear all of the hallmarks of a competitively negotiated procurement. *See, e.g.*, FAR Part 15.[5]

In essence, HUD's Invitation was a procurement. The GAO should assert its jurisdiction over the Protest since HUD is foreclosed from now retroactively characterizing the transaction as a grant or a cooperative agreement. 31 U.S.C. § 6303(2). Indeed, HUD's efforts to characterize the transaction as a grant or a cooperative agreement should draw particular GAO scrutiny since it indicates that HUD may be trying to use the grant or

[5] The HUD Letter (at 7) contends that the fact that the ACCs were referred to by HUD as "contracts" does not make them procurement contracts, for GAO bid review purposes. Clearly, the ultimate issue is the purpose of the ACCs, which, as shown above, are intended in the PBCA model to serve as service contracts for HUD. But GAO should consider that when HUD labels an instrument as a "contract," and engages in a procurement-style competitive process to select contactors, the instrument is a procurement contract, and GAO possesses jurisdiction to review it.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
(BID PROTEST)

CMS CONTRACT MANAGEMENT, et al. **Plaintiffs,** **v.** **THE UNITED STATES,** **Defendant,** **and** **MASSACHUSETTS HOUSING FNANCE AGENCY,** **Intervenor.**	**Nos. 12-852, 853, 862, 864, 869** **Judge Thomas C. Wheeler**

MOTION TO AMEND, OR IN THE ALTERNATIVE SUPPLEMENT, THE ADMINISTRATIVE RECORD

Plaintiff, The Jefferson County Assisted Housing Corporation ("JeffCo"), respectfully requests leave of the Court to amend and/or supplement the administrative record in this case in accordance with Rule7, Rule 52.1 and Appendix C of the Rules of the Court of Federal Claims.

Exhibits 1 through 4 of this Motion are the first category of documents JeffCo seeks to add to the administrative record. These documents were Exhibits 4, 5, 8 and 9 to JeffCo's protest before the Government Accountability Office ("GAO"), and which were also included as exhibits to JeffCo's Complaint before this Court (Exhibits 6, 7, 9, and 11). JeffCo requests that the Court either deem that the exhibits included with its Complaint are properly before this Court, or in the alternative we request that the documents be added to the administrative record. It appears the agency's failure to include these documents may have been inadvertent or due to a clerical error, because while they are listed in an index of documents, beginning at AR 496, their full text is not included. Regardless of the reason for their omission, these documents are material to the case at

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Performance-Based Annual Contributions Contract (ACC)

UNITED STATES
Department of Housing and Urban Development
PERFORMANCE-BASED ANNUAL CONTRIBUTIONS CONTRACT
Project-Based Section 8 Contract Administration

1. DEFINITIONS

ACCEPTABLE QUALITY LEVEL (AQL). The minimum required performance level for each Performance-Based Task. The Acceptable Quality Level for each Performance-Based Task specified in the Performance Requirements Summary (Exhibit A, Section 6). Performance is measured using the quantitative and qualitative requirements set forth in Performance Based Tasks (Exhibit A, Section 3), other provisions of the Performance-Based Annual Contributions Contract, and regulations, handbooks, forms, notices, and guidance issued by the United States Department of Housing and Urban Development.

ADMINISTRATIVE FEES. The sum of the Basic Administrative Fee that the United States Department of Housing and Urban Development pays the Public Housing Agency for each Covered Unit under a Housing Assistance Payments Contract (per unit per month) on the first day of the month, less any Disincentive Deduction Amount, plus any Incentive Fee for Customer Service and any Incentive Fees for Performance.

For descriptions of terms related to determination of Public Housing Agency administrative fees, see also Section 4 of Exhibit A of the Performance-Based Annual Contributions Contract.

BASIC ADMINISTRATIVE FEE. The amount that results when the Administrative Fee Percentage, approved by the United States Department of Housing and Urban Development, is multiplied by the current applicable 2-Bedroom Fair Market Rent for each Covered Unit under a Housing Assistance Payments Contract on the first day of the month during the Performance-Based Annual Contributions Contract Term.

BASIC ADMINISTRATIVE FEE EARNED. The Basic Administrative Fee less any Disincentive Deduction Amount.

BASIC ADMINISTRATIVE FEE PERCENTAGE. The percentage of the applicable annual per unit per month 2-bedroom Fair Market Rent within the State, which is used to calculate the monthly Basic Fee.

BASIC ADMINISTRATIVE FEE PERCENTAGE LIMITATION. The Basic Administrative Fee Percentage shall not exceed two and one-half (2.5) percent of the applicable per unit per month 2-bedroom Fair Market Rent for the State published by the United States Department of Housing and Urban Development.

BUDGET AUTHORITY. The maximum amount of funds available for payment to the Public Housing Agency under each Housing Assistance Payments Contract assigned to the Public Housing Agency under the Performance-Based Annual Contributions Contract. Budget authority is authorized and appropriated by the United States Congress.

CONTRACT ADMINISTRATION OVERSIGHT MONITOR (CAOM). Employees within the Office of Multifamily Housing, United States Department of Housing and Development, who conduct administrative, monitoring, and oversight functions related to the Public Housing Agency's compliance with and performance of the Performance-Based Annual Contributions Contract.

COVERED UNITS. Section 8 assisted units in the Service Area under Housing Assistance Payments Contracts assigned to the Public Housing Agency for contract administration under the Performance-Based Annual Contributions Contract.

DISASTER PLAN: Public Housing Agency's plan to respond to any threat or emergency that may interrupt essential Public Housing Agency functions and that the Public Housing Agency has tested and determined it to be sound and effective.

DISASTER PLAN CERTIFICATION: An annual certification by the Public Housing Agency that its Disaster Plan documentation is up-to-date, all employees and applicable sub-contractors have been trained and all backup plans and systems have been tested (Exhibit D).

DISINCENTIVE DEDUCTION AMOUNT. The dollar amount by which the Basic Administrative Fee is reduced by applying the Disincentive Deduction Percentage to the Performance-Based Task Allocation Amount of the Basic Administrative Fee if the Public Housing Agency's performance of the Performance-Based Tasks falls below Acceptable Quality Level as specified in the Performance Requirements Summary (Exhibit A, Section 5).

DISINCENTIVE DEDUCTION PERCENTAGE. The percentage applied to the Performance-Based Task Allocation Amount of the Basic Administrative Fee amount to arrive at the Disincentive Deduction Amount (Exhibit A, Section 5).

FAIR MARKET RENTS (FMR). The rents established by the United States Department of Housing and Urban Development, as required under section 8(c) (1) of the United States Housing Act of 1937, for units of varying sizes (by number of bedrooms) that must be paid in the market area to rent privately owned, existing, decent, safe, and sanitary rental housing of modest (non-luxury) nature with suitable amenities.

FAIR MARKET RENT AREA. The area for which the United States Department of Housing and Urban Development has established a Fair Market Rent.

FISCAL YEAR END (FYE). The last day of the last month of the Public Housing Agency's fiscal year.

FULL-TIME EQUIVALENT (FTE). One (1.00) full-time equivalent is a measure of employee work hours based on two thousand eighty (2,080) work hours per year per employee. The full-time equivalent of two employees working one thousand forty (1.040) work hours per year is one (1.00) full-time equivalent.

HOUSING ASSISTANCE PAYMENTS CONTRACT (HAP Contract). A project-based housing assistance payments contract authorized under Section 8 of the United States Housing Act of 1937 (but not including any such contract authorized under section 8(o)(13) or under former section 8(e)(2) of such Act) including any renewal of such contract, as authorized under the Multifamily Assisted Housing Reform and Affordability Act of 1997.

INCENTIVE FEE FOR CUSTOMER SERVICE. An annual fee for customer service that the Public Housing Agency may earn that is equal to five (5) percent of the total Basic Administrative Fee Earned for each twelve (12) month period of the term of the Performance-Based Annual Contributions Contract.

INCENTIVE FEES FOR PERFORMANCE. Annual fees for performance that the Public Housing Agency may earn if it achieves twelve (12) months of one-hundred (100) percent quality level performance of Performance-Based Tasks numbers one (1) through five (5). This performance level is greater than the Acceptable Quality Level specified in the Performance Requirement Summary (Exhibit A, Section 5). The incentive for each Performance-Based Task is one (1) percent of the total Basic Administrative Fee Earned for each twelve (12) month period of the term of the Performance-Based Annual Contributions Contract

INDEPENDENT AUDITOR (IA). An auditor who meets the auditor qualifications of Government Auditing Standards, including the qualifications relating to independence and continuing professional education. Additionally, the audit organization is to meet the quality control standards of Government Auditing Standards.

MULTIFAMILY ASSISTED HOUSING REFORM AND AFFORDABILITY ACT OF 1997, AS AMENDED (MAHRA). The statute authorizing the renewal of Housing Assistance Payments Contracts for project-based assistance under Section 8 of the United States Housing Act of 1937 upon termination or expiration of such contracts (42 U.S.C. section 1437f).

PERFORMANCE-BASED ANNUAL CONTRIBUTIONS CONTRACT (ACC). This contract between the United States Department of Housing and Urban Development and the Public Housing Agency.

PERFORMANCE-BASED ANNUAL CONTRIBUTIONS CONTRACT TERM (ACC TERM). A term of twenty-four (24) months unless extended at the sole election of the United States Department of Housing and Urban Development.

PERFORMANCE-BASED ANNUAL CONTRIBUTIONS CONTRACT YEAR END (ACC YEAR END). The last day of the last month of each twelve (12) month period of the Performance-Based Annual Contributions Contract Term.

PERFORMANCE-BASED CONTRACT ADMINSTRATOR (PBCA). Any entity determined by the United States Department of Housing and Urban Development to meet the definition of "public housing agency," as defined in section 3(b)(6)(A) of the United States Housing Act of 1937, and to be qualified to enter into and to perform the obligations of such an agency under the Performance-Based Annual Contributions Contract.

PERFORMANCE-BASED SERVICE CONTRACT (PBSC). The Performance-Based Service Contract is based on the development of a performance-based Statement of Work which defines the Performance-Based Tasks in measurable terms with established quantitative and qualitative performance standards and review methods to assure quality performance of the work.

PERFORMANCE-BASED TASK (PBT). A functional task that a Public Housing Agency must perform as described in the Statement of Work (Exhibit A, Section 4) in accordance with the requirements of the Performance-Based Annual Contributions Contract and regulations, handbooks, forms, notices, and guidance issued by the United States Department of Housing and Urban Development.

PERFORMANCE-BASED TASK ALLOCATION AMOUNT. The Basic Administrative Fee amount that is allocated to each Performance-Based Task based on the Performance-Based Task Allocation Percentage, as specified in the Performance Requirements Summary (Exhibit A, Section 5).

PERFORMANCE-BASED TASK ALLOCATION PERCENTAGE. The percentage of the Basic Administrative Fee Amount allocated to each Performance-Based Task for its performance, as specified in the Performance Requirements Summary (Exhibit A, Section 5). The Basic Administrative Fee Amount multiplied by the Performance-Based Task Allocation Percentage determines the Performance-Based Task Allocation Amount. This is the amount to which the Disincentive Deduction Percentage, if applicable, is applied to arrive at the Basic Administrative Fee Earned.

PERFORMANCE REQUIREMENTS SUMMARY (PRS). Exhibit A, Section 5 of the Performance-Based Annual Contributions Contract. The United States Department of Housing and Urban Development may amend the Performance Requirements Summary during the term of the Performance-Based Annual Contributions Contract by giving written notice to the Public Housing Agency.

PROGRAM EXPENDITURES. Amounts (including housing assistance payments and administrative fees) that may be charged against program receipts in accordance with the Performance-Based Annual Contributions Contract and the requirements of the United States Department of Housing and Urban Development.

PROGRAM PROPERTY. Program Receipts, including funds held by a depository institution, and the rights or interests of a Public Housing Agency under a Housing Assistance Payments Contract for Covered Units.

PROGRAM RECEIPTS. Administrative Fees and Housing Assistance Payments funds paid by the United States Department of Housing and Urban Development to the Public Housing Agency under the Performance-Based Annual Contributions Contract, and interest earned on Housing Assistance Payments funds in connection with the administration of the Section 8 program under the Performance-Based Annual Contributions Contract.

PUBLIC HOUSING AGENCY (PHA). The entity, as defined in section 3(b)(6)(A) of the United States Housing Act of 1937, that has entered into the Performance-Based Annual Contributions Contract with the United States Department of Housing and Urban Development.

QUALITY CONTROL PLAN (QCP). The PHA's internal control plan to ensure compliance with the provisions of the Performance-Based Annual Contributions Contract through procedures such as separation of duties, checks and balances, and reviews.

SECTION 8. Section 8 of the United States Housing Act of 1937, as amended (42 U.S.C. section 1437f).

SERVICE AREA. The State in which the Public Housing Agency provides contract administration services under the Performance-Based Annual Contributions Contract.

STATE. One of the fifty (50) United States, the District of Columbia, the United States Virgin Islands, or the Commonwealth of Puerto Rico.

THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT. The Federal agency authorized under Section 8 of the United States Housing Act of 1937 to enter into the Performance-Based Annual Contributions Contract.

UNITED STATES HOUSING ACT OF 1937, AS AMENDED (1937 Act). The statute in which the Section 8 program and related requirements are codified (42 U.S.C. section 1437).

2. **ACC**

a. Purpose

(1) This ACC is a contract between the PHA and HUD to administer project-based Section 8 Contracts as a PBCA. The ACC was awarded by HUD pursuant to a proposal submitted in response to HUD's published "Invitation for Submission of Applications: Contract Administrator for Project-Based Section 8 Housing Assistance Payments (HAP) Contracts" for PHAs to provide contract administration services for units assisted pursuant to a HAP Contract.

(2) Under Section 8, HUD is authorized to enter into an ACC with a PHA that enters into a HAP Contract with an owner of a multifamily housing project to make housing assistance payments for housing units occupied by eligible households, including a HAP Contract assigned to the PHA by HUD for contract administration services under the ACC. Under the ACC, the PHA will provide contract administration services for Covered Units.

(3) The ACC does not apply to contract administration of Section 8 projects assisted under the Section 8 moderate rehabilitation program (24 CFR part 882), including the Section 8 moderate rehabilitation single room occupancy program, or to contract administration of projects assisted under the Section 8 project-based voucher program or the project-based certificate program (24 CFR part 983).

b. Exhibits

This ACC includes the following exhibits, each of which is part of the ACC:

Exhibit A: PHA Contract Administration Responsibilities

Exhibit B: HAP Contracts

Exhibit C: Annual Financial Operations Report & FTE Certification

Exhibit D: Disaster Plan Certification

Exhibit E: Service Area

HUD may unilaterally amend Exhibit B from time to time to add HAP Contracts and/or withdraw HAP Contracts by giving the PHA written notice of the revised Exhibit B. Each such notice shall constitute an amendment of Exhibit B.

c. ACC Term

(1) The PHA shall provide contract administration services for Covered Units during the ACC Term which shall consist of twenty-four (24) months.

(2) After the initial term of the ACC, HUD may unilaterally elect to extend the ACC at HUD's sole discretion and shall exercise such extension by written notice to the PHA of HUD's election. HUD shall give any such extension notice at least three (3) calendar months before the expiration of the term of the ACC or an extension, if any.

3. PHA CONTRACT ADMINSTRATION SERVICES

1. Coverage

(1) The PHA shall enter into or assume HAP Contracts with owners of Covered Units to make housing assistance payments to the owners of such units during the HAP Contract term.

(2) During the ACC Term, the PHA shall provide contract administration services for the Covered Units in the Service Area.

(3) HUD will assign to the PHA existing HAP Contracts for Covered Units. The PHA agrees to accept all such assignments by HUD for the purpose of administering such HAP Contracts in accordance with the ACC during the ACC Term. Upon assignment by HUD, the PHA immediately and automatically assumes, during the ACC Term, the contractual rights and responsibilities of HUD, or of any PHA that is or was party to the HAP Contract, pursuant to such HAP Contracts for Covered Units in accordance with the ACC and HUD requirements.

2. Services

(1) The PHA shall perform all PHA responsibilities under the ACC in accordance with applicable provisions of:

- The 1937 Act;
- MAHRA;
- Other applicable Federal laws, including any amendments to or changes in such laws;

- HUD regulations and requirements, as amended or revised from time to time. Amendments will be effective no later than the first month of the next quarter following such notification; and

- This ACC.

(2) The PHA shall perform all of the following PBTs as described in the Exhibit A, Section 3 and as required by HUD issued regulations, handbooks, notices, and guidance.

- Conduct management and occupancy reviews.

- Adjust contract rents.

- Pay monthly vouchers from Section 8 owners.

- Renew HAP Contracts and process owner opt-outs (i.e., HAP expiration and non-renewal by owner) and HAP Contract terminations.

- Respond to tenant health, safety, and maintenance issues.

- Submit monthly and quarterly reports.

- Submit ACC Year End reports and certifications.

- Submit PHA FYE reports and certifications.

(3) The PHA shall require owners to comply with HUD requirements for occupancy of Covered Units, including requirements governing eligibility for assistance, resident contributions to rent, and examinations and reexaminations of household income.

(4) The PHA shall determine the amount of housing assistance payments to owners in accordance with the terms of the HAP Contracts and HUD requirements. The PHA shall pay owners the amount of housing assistance payments due to owners under such HAP Contracts from the amount paid to the PHA by HUD for this purpose.

3. The PHA shall take prompt and vigorous action, to HUD's satisfaction, and as required or directed by HUD, to ensure owner compliance with the terms of HAP Contracts for Covered Units within the scope of the ACC. Limitation on the Total Number of units Administered by the PHA and Serviced by Certain Subcontractors

(1) The total number of Section 8 Project-Based units that HUD will assign to the PHA under this ACC and any other performance-based ACC between HUD and the PHA will not exceed thirty-three (33) percent of the total number of units in the Portfolio of All Active Section 8 Project-Based Contracts as published by HUD

(2) The PHA shall not at any time during the ACC Term enter into any contract with an entity for such entity to perform fifty (50) percent or more of the FTEs required to perform PBTs numbers one (1) through six (6) under this ACC if the total number of Section 8 Project-Based units for which such entity is performing such services under this and other ACC(s) exceeds thirty-three (33) percent of the total number of units in the Portfolio of All Active Section 8 Project-Based Contracts as published by HUD without HUD's prior written approval.

(3) HUD will grant such approval only in exigent circumstances, as determined solely by HUD, to ensure continuity of effective contract administration.

4. PROGRAM RECEIPTS

a. Housing Assistance Payments

(1) HUD will make housing assistance payments to the PHA for Covered Units in accordance with HUD requirements.

(2) The amount approved and paid by HUD for housing assistance payments shall be sufficient for timely payment by the PHA to owners under HAP Contracts for Covered Units. If the PHA is unable to make timely payments to owners because of HUD delay in paying the PHA the amount sufficient for such payment (and such HUD delay is not caused by the PHA's action or failure to act), the PHA's failure to make timely payments to owners shall not be a default by the PHA under the ACC.

b. Administrative Fees

(1) The PHA earns a Basic Administrative Fee for each Covered Unit on the first day of the month in accordance with Exhibit A.

(2) In addition to the Basic Administrative Fee, the PHA may earn annual Incentive Fees for Performance and Customer Service in accordance with Exhibit A.

(3) The payment of Administrative Fees is subject to the availability of appropriated funds.

(4) Basic Administrative Fees are subject to Disincentive Deductions if performance of the PBTs specified falls below the AQL specified in the PRS (Exhibit A, Section 5).

(5) HUD will not pay a Basic Administrative Fee for any Covered Units for which the HAP Contract has been terminated.

c. Interest Earned

The dollar amount of interest earned on housing assistance payments deposited in a financial institution in connection with administration of the Section 8 program under the ACC.

5. FINANCIAL MANAGEMENT

a. Use of Program Receipts

(1) The PHA shall use program receipts in compliance with the U.S. Housing Act of 1937 and all HUD regulations and other requirements.

(2) The PHA shall use Administrative Fees to pay the operating expenses of the PHA to administer HAP Contracts.

(3) The Administrative Fees that exceed the PHA's costs to perform the ACC are not subject to HUD requirements governing use of Program Receipts. The PHA may use or distribute any such excess Administrative Fees for any purpose.

(4) The PHA shall use HAP funds to pay housing assistance to owners for Covered Units.

(5) HAP funds in excess of current needs for payments for Covered Units shall be invested in accordance with HUD requirements and, if required, as determined by HUD, promptly remitted to HUD.

(6) Interest earned on HAP funds shall be remitted to HUD at the end of the ACC year (see Annual Interest Certification requirement Exhibit A, PBT #8) or shall be invested in accordance with HUD requirements.

b. Depository

Unless otherwise required or permitted by HUD, all Program Receipts shall be promptly deposited with an institution under the control of, and whose deposits are insured by, the Federal Deposit Insurance Corporation under the following conditions:

(1) The PHA must determine that the financial institution has a rating consistent at all times with current minimally acceptable ratings as established by Government National Mortgage Association (GNMA).

(2) The PHA must monitor the institution's ratings no less than on a quarterly basis, and change institutions when necessary.

(3) The PHA must document the ratings of the institution where funds are deposited and maintain the documentation in the administrative record for three years, including the current year.

(4) The PHA shall enter into a Depository Agreement in the form prescribed by HUD.

(5) The PHA may only withdraw deposited Program Receipts for use in connection with the program in accordance with HUD requirements, including payment of housing assistance payments to owners.

(6) If HUD determines that the PHA has committed any default under the ACC, and has given the PHA notice of such determination, HUD may freeze deposited Program Receipts held by the depository institution and may withdraw deposited funds. The depository agreement shall provide that, if required under a written freeze notice from HUD to the depository institution:

- The depository institution shall not permit any withdrawal of deposited funds by the PHA unless withdrawals by the PHA are expressly authorized by written notice from HUD to the depository institution.

- The depository institution shall permit withdrawals by HUD of deposited funds.

(5) Unless approved by HUD, the PHA may not deposit under the depository agreement monies received or held by the PHA in connection with any other ACC or other contract between the PHA and HUD.

6. FIDELITY BOND COVERAGE

The PHA shall carry adequate fidelity bond coverage, as required by HUD, to compensate the PHA and HUD for any theft, fraud or other loss of program property resulting from action or non-action by PHA officers or employees or other individuals with administrative functions or responsibility for contract administration under the ACC.

7. MANAGEMENT REQUIREMENTS

a. The PHA shall (without any compensation or reimbursement in addition to Administrative Fee in accordance with Section 4.b of the ACC) perform all PHA obligations under the ACC, and provide all services, materials, equipment, supplies, facilities and professional and technical personnel, needed to carry out all PHA obligations under the ACC, in accordance with sound management practices, Federal statutes, the ACC, and HUD regulations and requirements, as amended or revised from time to time.

b. The PHA shall:

(1) Maintain telephone service during normal and customary business hours.

(2) Design and implement procedures and systems sufficient to fulfill all PHA obligations under the ACC.

(3) Take necessary actions to maintain professional working relationships with owners, management agents, residents and their representatives, neighborhood groups, and local government agencies.

(4) Refer inquiries from Congress or other governmental entities to HUD and promptly provide relevant information for HUD's responses.

8. PROGRAM RECORDS

a. The PHA shall maintain complete and accurate accounts and other records related to operations under the ACC. The records shall be maintained in the form and manner required by HUD, including requirements governing computerized or electronic forms of recordkeeping. The accounts and records shall be maintained in a form and manner that permits a speedy and effective audit.

b. The PHA shall maintain complete and accurate accounts and records for each HAP Contract.

c. The PHA shall furnish HUD such accounts, records, reports, documents and information at such times, in such form and manner, and accompanied by such supporting data, as required by HUD, including electronic transmission of data as required by HUD.

d. The PHA shall furnish HUD with such reports and information as may be required by HUD to support HUD data systems.

e. HUD and the Comptroller General of the United States, or their duly authorized representatives, shall have full and free access to all PHA offices and facilities, and to all accounts and other records of the PHA that are relevant to PHA operations under the ACC, including the right to examine or audit the records and to make copies. The PHA shall provide any information or assistance needed to access the records.

f. The PHA shall keep accounts and other records for the period required by HUD.

g. HUD may review and audit PHA performance of its responsibilities under the ACC. The PHA shall comply with Federal audit requirements. The PHA shall engage an IA to conduct audits that are required by HUD. The PHA shall cooperate with HUD to promptly resolve all audit findings, including audit findings by the HUD Inspector General or the General Accounting Office.

h. Records, reports, documents, and information regarding tenants collected by the PHA pursuant to or in furtherance of HUD regulations shall be protected under the Privacy Act of 1974, 5 U.S.C. § 552(a), and the Federal Information Security Management Act (FISMA), 44 U.S.C § 3541.

9. DEFAULT BY PHA

a. Definition of default

Occurrence of any of the following events is a default by the PHA under the ACC:

(1) The PHA has failed to:

- Comply with PHA obligations under the ACC, or
- Comply with PHA obligations under a HAP Contract with an owner, or
- Take appropriate action, to HUD's satisfaction or as required or directed by HUD, for enforcement of the PHA's rights under a HAP Contract.

(2) The PHA has made any misrepresentation to HUD of any material fact.

b. Termination of ACC because of PHA default

(1) HUD may terminate the ACC at any time in whole or in part if:

- HUD determines that the PHA has committed any default or pattern of default under the ACC,
- HUD has given the PHA notice of the default and a reasonable opportunity to cure the default prior to termination, and
- The PHA has not corrected the default within the cure period provided by HUD.

(2) In determining the length of time within which the PHA must cure the default, and in determining the remedial actions that the PHA must take to do so, HUD shall have discretion to consider the circumstances of the case, including, but not limited to, such factors as any prior failure(s) or pattern(s) of failure by the PHA to comply with PHA obligations under the ACC, and the seriousness of any such failure(s).

(3) If HUD determines that urgent or other exigent circumstances require immediate termination of the ACC, HUD may terminate the ACC at any time, without allowing any opportunity to cure by giving notice to the PHA. Such circumstances include diversion or misuse of program receipts, PHA misrepresentation to HUD of any material facts, or any failure of program administration that, in HUD's sole determination, adversely affects, or may so affect, the welfare of assisted families.

(4) If HUD elects to terminate the ACC, HUD shall terminate the ACC by written notice to the PHA, which shall state:

- The reason for termination, and
- The effective date of the termination.

c. Other remedies

(1) HUD may take title or possession to any and all Program Property:

- Upon occurrence of a default by the PHA, or
- Upon termination of the ACC in whole or in part, or

- Upon expiration of the ACC Term.

(2) HUD's exercise or non-exercise of any right or remedy for PHA default under the ACC is not a waiver of HUD's right to exercise that or any other right or remedy at any time.

10. CONFLICT OF INTEREST

a. Neither the PHA, nor any PHA contractor, subcontractor or agent for operations under the ACC, nor any other entity or individual with administrative functions or responsibility concerning contract administration under the ACC, may enter into any contract, subcontract, or other arrangement in connection with contract administration under the ACC in which any covered individual or entity has any direct or indirect interest (including the interest of any immediate family member), while such person is a covered individual or entity or during one year thereafter.

b. "Immediate family member" means the spouse, parent, child, grandparent, grandchild, sister, or brother of any covered individual.

c. "Covered individual or entity" means an individual or entity that is a member of any of the following classes:

(1) A member, officer or director of the PHA, or other PHA official with administrative functions or responsibility concerning contract administration under the ACC.

(2) If the PHA is an instrumentality of a governmental body:

- A member, officer or director of such governmental body.

- A member, officer or director of any entity that holds a direct or indirect interest in the instrumentality entity.

(3) An employee of the PHA.

(4) A PHA contractor, subcontractor or agent with administrative functions or responsibility concerning contract administration under the ACC, or any principal or other interested party of such contractor, subcontractor or agent.

(5) An individual who has administrative functions or responsibility concerning contract administration under the ACC, including an employee of a PHA contractor, subcontractor or agent.

(6) A public official, member of a governing body, or State or local legislator, who exercises functions or responsibilities concerning contract administration under the ACC.

d. The PHA shall require any covered individual or entity to disclose his, her or its interest or prospective interest in any contract, subcontract or other arrangement in connection with contract administration under the ACC to the PHA and HUD.

e. During the term of the ACC, the PHA shall not own or otherwise possess any direct or indirect interest in any Covered Unit (including a unit owned or possessed, in whole or in part, by an entity substantially controlled by the PHA), and shall not claim or receive any administrative fee for contract administration of a unit in which the PHA has any such interest.

f. Notwithstanding paragraph e, if the PHA is a State, or an agency or instrumentality of a State (not including a municipality, county or other agency of local government), and provides or has provided financing for development, repair or improvement of Covered Units, and holds a mortgage of the real property to secure such financing:

(1) The existence of such mortgage or interest shall not be considered a conflict of interest under paragraph e, (provided that the PHA has not obtained any other ownership interest in the property, by exercise of its remedies as mortgagee or otherwise), and in such case, paragraph e shall not bar the PHA from claiming or receiving an administrative fee for contract administration of such Covered Units.

(2) The PHA shall fully disclose such mortgage or interest to HUD, regarding any defaults by the mortgagee or borrower under such mortgage, and any actions considered or taken by the PHA to enforce the mortgage or the terms of such financing against the owner or the real property. The PHA will provide HUD copies of written notices of default it provides to borrowers and written notices of remedial steps to be undertaken by the borrower. HUD may require the PHA to take measures or actions necessary to assure that the PHA's interest as lender or mortgagee does not prejudice the PHA's full and vigorous performance of contract administration services for the Covered Units in accordance with the ACC, or HUD may amend Exhibit B of the ACC to withdraw such Covered Units, and the funding for such units, from the scope of the ACC.

g. HUD may waive the conflict of interest requirements for good cause. Any covered individual or entity for whom a waiver is granted may not execute any contract administration functions or responsibility concerning a HAP Contract under which such individual is or may be assisted, or with respect to a HAP Contract in which such individual or entity is a party or has any interest.

h. No member of or delegate to the Congress of the United States of America or resident commissioner shall be admitted to any share or part of the ACC or to any benefits which may arise from it.

11. EQUAL OPPORTUNITY

a. The PHA shall comply with all equal opportunity requirements imposed by Federal law, including applicable requirements under:

(1) The Fair Housing Act, 42 U.S.C. 3601-3619 (implementing regulations at 24 CFR parts 100 et seq.).

(2) Title VI of the Civil rights Act of 1964, 42 U.S.C. 2000d (implementing regulations at 24 CFR part 1).

(3) The Age Discrimination Act of 1975, 42 U.S.C. 6101-6107 (implementing regulations at 24 CFR part 146).

(4) Executive Order 11063, Equal Opportunity in Housing (1962), as amended, Executive Order 12259, 46 FR 1253 (1980), as amended, Executive Order 12892, 59 FR 2939 (1994) (implementing regulations at 24 CFR part 107).

(5) Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (implementing regulations at 24 CFR part 8).

(6) Title II of the Americans with Disabilities Act, 42 U.S.C. 12101 et seq.

b. The PHA shall submit a signed certification to HUD that the PHA shall carry out its responsibilities under the ACC in accordance with the Fair Housing Act, Title VI of the Civil Rights Act of 1964, the Age Discrimination Act of 1975, Executive Order 11063, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act.

c. The PHA shall cooperate with HUD in the conduct of compliance reviews and complaint investigations pursuant to applicable civil rights statutes, Executive Orders, and related rules and regulations.

12.

12. COMMUNICATION WITH HUD

The PHA shall communicate with HUD through the official or officials designated by HUD.

13. EXCLUSION OF THIRD PARTY RIGHTS

a. A family that is eligible for housing assistance under the ACC is not a party to or a third party beneficiary of the ACC.

b. Nothing in the ACC shall be construed as creating any right of any third party to enforce any provision of the ACC, or to assert any claim against HUD or the PHA, either under the ACC or under a HAP Contract assigned to a PHA under the ACC.

PUBLIC HOUSING AGENCY

_____
Name of Public Housing Agency

_____
Name and title of authorized representative (print)

_____ _____
Signature of authorized representative Date

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

_____
Name and title of authorized representative (print)

_____ _____
Signature of authorized representative Date

EXHIBITS

CONTENTS

EXHIBIT A
PHA RESPONSIBILITES

1. OBJECTIVES

1.1. Programmatic Objectives: HUD seeks to achieve three programmatic objectives.

- Calculate and pay Section 8 rental subsidies correctly.
- Administer project-based Section 8 HAP Contract consistently.
- Take actions to ensure that owners fulfill their obligations to provide decent housing for eligible families.

1.2. Administrative Objectives: HUD seeks to achieve three administrative objectives.

- Execute an ACC only with a PHA that has the qualifications and expertise to oversee and manage affordable housing, and that has the capacity to perform the required contract administration services, including necessary personnel and other resources.
- Get the best value for dollars spent for PHA services.
- Encourage the development of joint ventures and or partnerships for contract administration services to obtain the benefit of the best practices of both public and private sectors.

2. PHA CERTIFICATION

The entity executing the ACC with HUD certifies that is a "public housing agency," as defined in section 3(b)(6)(A) of the 1937 Act, 42 U.S.C. section 1437a(b)(6)(A), and that it satisfies all legal requirements set forth in the "Invitation for Submission of Applications: Contract Administrators for Project-Based Section 8 Housing Assistance Payments (HAP) Contracts." The entity executing the ACC with HUD further certifies that it will continue to satisfy the above-referenced definition of "public housing agency" and that it will remain in compliance with the foregoing requirements throughout the ACC Term.

3. PBTs

This section describes the eight (8) PBTs that the PHA must perform.

1. Management and Occupancy Reviews.
2. Adjust Contract Rents.

3. Review and Pay Monthly Vouchers.

4. Renew HAP Contracts and Process Terminations or Expirations.

5. Tenant Health, Safety, and Maintenance Issues.

6. Administration — Monthly and Quarterly Reports.

7. Administration — ACC Year End Reports and Certifications.

8. Annual Financial Reports — PHA FYE.

Each PBT description contains the following elements:

Outcome: The required result of the PBT.

Requirements: A description of specific elements required to perform the PBT. HUD will measure the PHA's performance of each such element as the performance standard to determine its AQL and to calculate the amount of the Administrative Fee.

References: HUD regulations, handbooks, notices, and guidance and other requirements, as amended or revised from time to time, that set forth additional requirements related to performance of the PBT.

All references mentioned in the description of the tasks are generally available on HUD's website at the following Uniform Record Locator (URL): http://www.hud.gov/offices/adm/hudclips/index.cfm. Copies of HUD guidance or directives may be ordered through the HUD website, or through the HUD Multifamily Clearinghouse at 1-800-685-8470.

HUD does not represent that the references listed in the ACC, or on the HUD website are a complete listing of current relevant HUD regulations and requirements. The PHA is required to comply with HUD regulations and requirements, as amended or revised from time to time.

HUD's regulations are codified in Title 24 of the Code of Federal Regulations (CFR). Revisions or additions to HUD regulations are initially published in the Federal Register. HUD may also publish Federal Register notices. In addition to publication in the Federal Register and the CFR, HUD issues additional program requirements as HUD "directives", including HUD handbooks, forms, notices, and guidance.

Quality Assurance: A listing of the methods and resources HUD will use to verify the accuracy of the PHA's reported performance and accomplishments. HUD may use other methods that it deems appropriate to assure quality.

3.1. PBT #1 – Management and Occupancy Reviews

The PHA must conduct an on-site Management and Occupancy Review (MOR) of each assigned Section 8 project. The review must evaluate, analyze, or assess the owner's operating policies, procedures, and practices related to compliance with the HAP Contract as set forth in regulations, handbooks, forms, notices, and guidance issued by HUD.

Outcome: Identify and resolve areas of noncompliance with HUD regulations and requirements, as amended or revised from time to time.

Requirements:

- Schedule and conduct reviews of each project in the assigned portfolio annually during the term of the ACC, using Form HUD 9834. Evaluate the owner's operating policies, procedures, and practices related to compliance with the HAP Contract.

- Verify compliance with HUD regulations and requirements, as amended or revised from time to time, regarding occupancy issues (e.g., resident eligibility and selection, examination and reexamination of family income and assets, household characteristics), and verify that correct documentation is contained in each resident file to support claims for payment under the HAP Contract. Use the following resident file random sampling:

Number of Units	Minimum File Sample
100 or fewer	5 files plus 1 for each 10 units over 50
101-600	10 files plus 1 for each 50 units or part of 50 over 100
601-2000	20 files plus 1 for each 100 units or part of 100 over 600
over 2,000	34 files plus 1 for each 200 units or part of 200 over 2200

If the PHA's review of the sample indicates a pattern of deficient owner or management agent performance in one or more of areas of income and rent determination or process, the PHA must require the owner to conduct a one-hundred (100) percent review of the files and report the results of the review to the PHA. The PHA must evaluate the review done by the owner to determine its reliability and accuracy.

- Notify the jurisdictional HUD office by close of next business day of any potential fraud or potential violations of law identified during the PHA review.

- Prepare and submit to the owner a written report, on form HUD-9834, within thirty (30) calendar days of the PHA review, which records and describes deficiencies, findings and corrective actions.

- Provide the jurisdictional HUD office with reports rated below average or unsatisfactory.

- PHA must review and document compliance by Section 8 owners with civil rights regulations in accordance with the requirements of the Joint Agreement, Office of Fair Housing and Equal Opportunity and The Office of Housing, General Operational Procedures for the Civil Rights Front-End and Limited Monitoring Reviews of Subsidized Multifamily Housing Projects.

- Enter data into the appropriate HUD data system.

REAC Follow-up

- Obtain copy of owner certification that all Exigent Health and Safety (EH&S) deficiencies have been corrected.

- Determine whether EH&S and other deficiencies have been corrected.

- Recommend actions to stop HAP payments supported by specific reasons for the actions to the jurisdictional HUD office.

- If directed by HUD, stop HAP payments when owner fails to correct violations within designated time period.

Enterprise Income Verification (EIV) Monitoring

Monitor owner/management agent compliance with EIV requirements as specified in Rental Income Determination Quality Control Monitoring Guide for Multifamily Housing Programs and Housing Notice H 2010-10, EIV System.

References:

HUD Handbook 4350.1, Multifamily Asset Management and Project Servicing

Form HUD-9834, Appendix 1, HUD Handbook 4350.1

HUD Handbook 4350.3, Occupancy Requirements of Subsidized Multifamily Housing Programs

Housing Notice H 2010-02, EIV & You Brochure

Housing Notice H 2010-10, EIV System

Housing Notice H 09-15, Implementation of the Violence Against Women and Justice Department Reauthorization Act of 2005 for the Multifamily Project-Based Section 8 Housing Assistance Payments Program.

Rent and Income Determination Quality Control Monitoring Guide for Multifamily Housing Program.

Joint Agreement, Office of Fair Housing and Equal Opportunity and the Office of Housing, General Operational Procedures (GOP) for the Civil Rights Front-End and Limited Monitoring Reviews of Subsidized Multifamily Housing Projects.

Performance Standards
• Conduct on-site MOR review at each project in the assigned portfolio annually during the term of the ACC.
• The Form HUD-9834 Summary Report is transmitted to the owner within 30 calendar days of completion of the on-site MOR.
• The Form HUD-9834 Summary Report utilizes HUD's written rating policy.
• The Form HUD-9834 Summary Report is substantiated by the appropriate supporting documentation (HUD form 9834 and tenant file review forms).
• The MOR complies with HUD handbooks and Rent and Income Determination Quality Control Guide for Multifamily Housing Programs.
• Review and respond to owner response to the Form HUD-9834 Report findings, within thirty (30) calendar days of receipt.
• Respond to owner appeal within forty-five (45) calendar days of receipt.

Quality Assurance:

On-Site Reviews

Data Systems Reports

3.2. PBT #2 – Adjust Contract Rents

Contract rents under HAP Contracts that are adjusted at times other that Contract Renewal during the contract HAP Contract term must be adjusted in accordance with the HAP Contract and HUD requirements.

The PHA must process contract rent adjustments correctly when requested by the owner under appropriate Budget-Based, Annual Adjustment Factor, Operation Cost Adjustment Factor, and Special Adjustments options and in a timely manner.

If applicable, the PHA must analyze adjustments of the owner utility allowance schedule.

Outcome: Contract rent adjustments are timely and correct.

Requirements:

A. Budget-Based Rent Adjustments

Where applicable, the budget-based rent adjustment method requires a Section 8 owner to submit an operating budget and supporting documentation for PHA review. The rent adjustment may require HUD approval.

The PHA must determine budget-based adjustments of contract rent by performing the following tasks:

- Analyze the project's operating budget and supporting documentation for a rent adjustment to determine reasonableness according to guidance in HUD Handbook 4350.1, Multifamily Asset Management and Project Servicing;
- Document contract rent increases on a rent schedule (Form HUD-92458);
- Analyze adjustments of the owner utility allowance schedule, if applicable;
- If the HAP Contract requires the owner to maintain a reserve for replacement, analyze adjustment to the monthly reserve for replacement deposit, as required, and recommend action to HUD;
- Approve or disapprove the amount of rent adjustment and provide written notification to the owner;
- Verify accurate, timely completion and submission of the adjusted rent schedule by the owner; and
- Submit proposed rent increases greater than ten-percent (10%) to HUD for approval or disapproval. HUD must notify PHA of the decision and the PHA must provide written notification to the owner.
- Enter data into the appropriate HUD data system.

B. Annual Adjustment Factor (AAF)

This rent adjustment method generally requires the PHA to apply the AAF to current contract rents. AAFs are published annually in the Federal Register.
The PHA must perform the following tasks:

- Determine the amount of annual adjustments in accordance with HUD requirements;
- Analyze adjustments of the owner utility allowance schedule, if applicable;
- If the HAP Contract requires the owner to maintain a reserve for replacement, analyze adjustment to the reserve for replacement, and recommend action to HUD;

- Validate comparability study if submitted by the owner to support a rent adjustment request;
- Verify accurate, timely completion and submission of adjusted rent schedule by the owner; and
- Enter data into the appropriate HUD system.

C. Operating Cost Adjustment Factors (OCAF)

- Determine the amount of OCAF in accordance with HUD requirements;
- Analyze adjustments of the owner utility allowance schedule, if applicable;
- Calculate the amount of rent adjustment and provide written notification to the owner;
- Validate comparability study if submitted by the owner to support a contract renewal request;
- Verify accurate, timely completion and submission of adjusted rent schedule by the owner; and
- Enter data into the appropriate HUD system.

D. Special Adjustments

For HAP Contracts which provide for AAF adjusted rents, the Section 8 owner may request a special adjustment for cost increases generally applicable to housing in the locality, such as increases in cost items such as insurance, taxes or utility rates. The appropriate jurisdictional HUD office must approve or deny all special adjustments within thirty (30) calendar days of receipt of a properly documented request from the PHA.

The PHA must process the owner's request for a special rent adjustment to determine if the special adjustment should be approved by HUD. To accomplish this, the PHA must perform the following tasks:

- Analyze a special adjustment request from the owner;
- Recommend action to the appropriate jurisdictional HUD office;
- Based on notification from HUD, notify the owner of rent adjustment approval or disapproval;

- Verify accurate, timely completion and submission of an adjusted rent schedule by the owner; and

- Enter data into the appropriate HUD data system.

E. Rent Appeals

A Section 8 owner may appeal the PHA rent adjustment decision. The first level of appeal is to the PHA; the second level of appeal is to the appropriate jurisdictional HUD office. The PHA must review owner appeals.

The PHA must perform the following tasks:

First level appeal

Analyze the owner's rent appeal request.

Provide the owner with written notice of PHA decision and justification within thirty (30) calendar days of receipt of the owner's request.

If the appeal is approved:

- Verify accurate, timely completion and submission by the owner of the adjusted rent schedule, and

- Enter data into the appropriate HUD data system.

If the appeal is denied:

- Notify the owner of opportunity for second level appeal with notice of PHA decision and justification.

Second level appeal

If the appeal is approved by HUD:

- Receive approval from jurisdictional HUD office within thirty (30) calendar days after request for second level appeal;

- Verify accurate, timely completion and submission of adjusted rent schedule by the owner; and

- Enter data into the appropriate HUD data system.

If the appeal is denied by HUD:

Any decision rendered by HUD will be final and will not be subject to further appeal above that level.

References:

HUD Handbook 4350.1, Multifamily Asset Management and Project Servicing

Section 8 Renewal Policy Guide Book

Performance Standards
• Process rent adjustment request within thirty (30) calendar days of the owner's complete submission, as defined by written HUD guidance.
• Process the rent adjustment according to current written HUD policy.
• Receive HUD approval for budget-based rent increases of more than ten (10) percent..
• Process utility allowance adjustments based on current policy.
• Respond to owner appeals within thirty (30) calendar days of receipt.

Quality Assurance:

On-Site Reviews

Data Systems Reports

3.3. PBT #3 – Review and Pay Monthly Vouchers

Part 208 of Title 24 of the Code of Federal Regulations, "Electronic Transmission of Required Data for Certification and Recertification and Subsidy Billing Procedures for Multifamily Subsidized Projects," requires Section 8 project owners to request housing assistance payments by vouchers submitted monthly through the Tenant Rental Assistance Certification System (TRACS). Vouchers are due the tenth (10^{th}) day of the month preceding the month for which the owner is requesting payment. For vouchers received after the tenth (10^{th}) day of the previous month, the PHA must submit voucher within twenty calendars days of receipt. A PHA may not pay owners until owner vouchers are received, reviewed, and approved.

Outcome: Payments of Section 8 vouchers and claims are only authorized and paid for eligible Covered Units. Payments are to be made to owners monthly by the first business day after receiving HAP funds from HUD.

Requirements

A. Verify and certify accuracy of monthly Section 8 vouchers

The PHA must verify and provide written documentation certifying the accuracy of owner payment requests by the last day of each month before the month when payment

is due to the owner in accordance with the HAP Contract. The PHA disburses housing assistance payments to the owner in response to the owner's payment request as verified by the PHA. To accomplish this task, the PHA must:

- Monitor owner compliance with obtaining access to and using EIV system;
- Monitor owner compliance with requirements for entry of all resident certification and recertification data in TRACS;
- Verify voucher submissions by owner through the TRACS system by the tenth day (10^{th}) of the month proceeding the month for which the owner is requesting payment;
- Verify through TRACS that the amount of the housing assistance payment paid on behalf of each resident is accurate;
- Verify that all re-certifications are completed by the owner in a timely manner and entered into TRACS;
- Verify that the owner's payment request does not include any vacant units or Covered Units for which Section 8 assistance has been stopped.
- Analyze required adjustments from prior month's vouchers to determine accuracy and validity;
- Determine if authorized rent or utility allowance adjustments have been implemented timely and accurately;
- Verify pre-approval of Section 8 Special Claims (see paragraph B of this section);
- Notify the owner, in writing, of any corrections required and track corrections;
- Verify that owners are complying with HUD regulations and requirements, as amended or revised from time to time; and
- Submit error tracking log to HUD Headquarters semi-annually based on the Federal fiscal year, the number of errors discovered by category and the number of errors that are resolved or are in the process of being resolved. The reports are due 30-days after the end of the semi-annual period or on the next business day when the deadline falls on a weekend or holiday.

Semi-annual period Report Due: 10/1 through 3/31—4/30
4/1 through 9/30—10/31

B. Verify and authorize payment only on valid Section 8 Special Claims for unpaid rent, resident damages or vacancy loss.

A Section 8 project owner may claim reimbursement from the PHA to the extent provided in the HAP Contract for unpaid rent, resident damages, and vacancy losses on Covered Units. Eligible claims must be pre-approved by the PHA before being submitted with owner's monthly voucher. The PHA must:

- Analyze, verify, adjust, and approve or disapprove owner claims in accordance with HUD regulations and requirements, as amended or revised from time to time (including program requirements in HUD directives such as handbooks, notices or forms); and using TRACS and information provided by the owner;

- Enter data into a spreadsheet program for monitoring PHA payments. The program must comply with HUD standards and requirements; and

- For all approved or reduced claims, notify the owner of the approved claim in writing within thirty (30) calendar days of receipt in accordance with the Special Claims Processing Guide.

C. Disburse Section 8 Payments to Owners

The PHA shall process payments for only those units on the voucher that have a fully processed and approved Form HUD 50059, Owner's Certification of Compliance with HUD's Tenant Eligibility and Rent Procedures. The PHA must:

- Notify the owner in writing of any required corrections;

- Maintain a record of required corrections in an error tracking log that records errors by category and the status of its resolution and

- Submit the error tracking log to HUD Headquarters semi-annually based on the Federal fiscal year within 30-days after the end of the semi-annual period.

After the PHA has approved the owner's Section 8 voucher (see paragraph A of this section), the PHA must disburse housing assistance payments to the owner by an electronic fund transfer, after receipt of HAP funds from HUD.

Reference:

HUD Handbook 4350.3, Occupancy Requirements of Subsidized Multifamily Housing Programs

Form HUD-50059, Owner's Certification of Compliance with HUD's Tenant Eligibility and Rent Procedures, Appendix 7-B, HUD Handbook 4350.3

Housing Notice H 2010-10, EIV System

TRACS Industry User Guide

Special Claims Processing Guide (HSG-06-01)

Performance Standards	
•	Review 100% of monthly vouchers submitted by owners.
•	Make the HAP payment on units with approved and fully processed Form HUD 50059s.
•	For vouchers received by the tenth (10^{th}) calendar day of the month, pay the owner on the first business day following receipt of the funds from HUD.
•	For vouchers received after the tenth (10^{th}) calendar day of the previous month, the PHA shall submit the voucher for payment within twenty (20) calendar days of receipt.

Quality Assurance:

On-Site Reviews

Data Systems Reports

3.4. PBT #4 – Renew HAP Contracts and Process Terminations or Expirations

As HAP Contracts approach expiration, owners who want to renew the HAP Contract must request renewal in accordance with HUD regulations and requirements, as amended or revised from time to time, to ensure continued Section 8 assistance. At the time of HAP Contract renewal, the owner may request a rent adjustment (see rent adjustment requirements at Section 3.2, PBT #2 – Adjust Contract Rents). The PHA must ensure that owners fulfill their obligations to residents and HUD, consistent with owner renewal decisions.

Outcome #1: Expiring HAP Contracts are renewed.

Outcome #2: Required tenant data is provided to HUD at the time of owner opt-out or HAP Contract termination.

Outcome #3: Eligible residents in occupancy at the time of owner opt-out or HAP contract termination receive rental assistance until a tenant-based voucher has been issued.

Requirements:

HAP Contract Renewals

- Verify that owners of projects with expiring HAP Contracts provide required notice to the PHA and project residents;
- Review owner's one (1) year tenant notification letter to verify that it meets statutory and administrative requirements;
- Maintain copies of owner's notice to PHA and project residents;
- Verify that the owner has submitted the appropriate HAP renewal option;
- Prepare HAP Contract in the form required by HUD and mail to owner for execution:
- After receipt of confirmation from HUD of funding for renewal, ensure the HAP Contract is executed (signed) by the PHA and mailed to HUD for execution;
- After receipt from HUD of a fully executed HAP contract, mail the original copy to the owner within five (5) business days and retain a copy for PHA file; and
- Execute and distribute copies of the HAP Contract within one (1) business week to the owner, jurisdictional HUD office, and PHA files.

Opt-out and HAP Contract termination

A HAP Contract may terminate because:

- The HAP Contract expires, and the owner chooses not to renew the expiring contract (opt-out); or
- The HAP Contract is terminated by the PHA for owner default (after HUD approves the termination).

A. Notification requirements

The PHA must:

- Inform the jurisdictional HUD office by close of next business day after notice by the owner that the owner has elected to opt-out of the HAP Contract;
- Inform the jurisdictional HUD office of the PHA's recommendation to terminate a HAP Contract because of owner default;
- Verify that the owner has complied with the notification requirements of the HAP Contract and current law and HUD guidance on opt-outs; and

- Provide residents with contact information for the entity providing tenant-based vouchers.

B. Reporting and assistance requirements

The PHA must provide resident payment (family income and total tenant payment) and family unit size data (family size and composition, and size of Section 8 unit currently occupied by family), using Form HUD 50059, to jurisdictional HUD office within 3 business days after receipt of such information from the owner, and at least 90 calendar days before HAP contract termination, for the purpose of obtaining Section 8 vouchers for tenant.

The PHA must ensure that eligible residents in occupancy at the time of owner opt-out or HAP contract termination receive rental assistance until a tenant-based voucher has been issued.

Reference:

Section 8 Renewal Policy Guide Book

Performance Standards
• Provide owner notification of HAP Contract expiration within 150-180 days in advance of HAP Contract expiration date.
• Review owner's one (1) year tenant notification letter to verify that it meets statutory and administrative requirements.
• Review owner's renewal submission for completeness, within seven (7) business days of receipt.
• Process is completed within forty-five (45) calendar days of receipt of a complete owner submission.
• In the case of opt-outs, PHA notifies HUD of opt-out by the close of the next business day after receipt of the owner's 120-day notification.
• Submit complete resident data to HUD, using Form HUD-50059, within three (3) business days of receipt of the owner's 120-day notification of opt-out.
• Rent adjustments in conjunction with contract renewals must be processed in accordance with standards and AQL for PBT 2, Adjust Contract Rents.

Quality Assurance:

On-Site Reviews

Data Systems Reports

Monthly Invoice

3.5. PBT #5 – Tenant Health, Safety, and Maintenance Issues

The PHA must accept and record tenant concerns and inquiries related to health, safety, and maintenance issues and follow-up with owners to ensure that owners take appropriate corrective actions.

Outcome: Resolve tenant issues and establish positive relations and communications with residents and the community.

Requirements:

- Maintain tracking system and log for tenant concerns and inquiries that includes PHA communication with owners and tenants, owner's corrective actions, and owner's planned vs. actual corrective performance. Submit log to jurisdictional HUD office with monthly invoices.
- Notify owner of tenant concerns or inquiries within one (1) business day of receipt of the tenant concern or inquiry, direct owner to contact tenant to clarify nature of the issue and report to the planned actions and scheduled completion date to correct issues to the PHA not later than close of the next business day.
- Notify tenant of owner's planned corrective actions and scheduled completion date not later than three (3) business days of receipt of the tenant concern or inquiry.
- Contact owner to verify completion of corrective actions within one (1) business day following the scheduled completion date and notify the tenant.
- Monitor owner's corrective action completion performance and keep tenant informed of changes in corrective actions and/or scheduled completion dates until corrective actions are completed and verified by the tenant.

References:

HUD Handbook 4381.5, The Management Agent Handbook

Performance Standards
• Submit tenant health, safety, and maintenance issues tracking log to HUD with monthly invoices.
• Notify owner of tenant concerns or inquiries within one (1) business day of receipt of the tenant concern or inquiry, direct owner to contact tenant to clarify nature of the issue and report to the planned actions and scheduled completion date to correct issues to the PHA not later than close of the next business day.

•	Notify tenant of owner's planned corrective actions and scheduled completion date not later than three (3) business days of receipt of the tenant concern or inquiry.
•	Contact owner to verify completion of corrective actions within one (1) business day following the scheduled completion date and notify the tenant.
•	Monitor owner's corrective action completion performance and keep tenant informed of changes in corrective actions and/or scheduled completion dates until corrective actions are completed and verified by the tenant.

Quality Assurance:

On-Site Reviews

Monthly Invoice

3.6. PBT #6 – Administration – Monthly and Quarterly Reports

To track the performance of the Section 8 program, monitor and evaluate PHA performance, and identify technical assistance needs, HUD requires the PHA to regularly report its contract administration activities. Therefore, the PHA must provide monthly and quarterly reports to the CAOM in the jurisdictional HUD office.

Outcome: HUD can monitor and evaluate program performance from accurate, timely reports submitted by the PHA.

Requirements:

Monthly Invoice

The PHA must submit an invoice to the CAOM in the jurisdictional HUD office.

Monthly Work Plan Report

PHA must submit report to the CAOM in the jurisdictional HUD office by the tenth (10^{th}) business day of each month for the previous month's activities.

The Monthly Work Plan report must contain a detailed description of:

- Actual accomplishments for the month and year-to-date compared to the Annual Work Plan for the same period, including the names and titles of the PHA staff performing the PBTs;
- Instances where the actual performance of processes is negative when compared to the planned performance specified in the process metrics set forth in the PHA's Invitation for Submission of Applications: Contract Administrators for

Project-Based Section 8 Housing Assistance Payments (HAP) Contract under the Technical Approach, Section 4.2, Element 1;

- Quality control activities and results for each instance of PBT performance at less than the AQL as set forth in the PHA's Invitation for Submission of Applications: Contract Administrators for Project-Based Section 8 Housing Assistance Payments (HAP) Contract under Quality Control Plan,, Section 4.3, Element 1; and

- Owner issues that required special attention due to such matters as, abatement actions, excessive resident complaints, inquiries from governmental officials or the general public;

- Major accomplishments, success stories, etc.;

- Noteworthy meetings; and

- Pending issues.

Quarterly Risk Assessment Report

During each twelve (12) month period of the term of the ACC, HUD will provide the PHA a quarterly report based on data from HUD systems for assigned Section 8 HAP contracts within the PHA's service area. The PHA shall provide HUD its evaluations and analyses of the data along with discussions of factors influencing performance, changes, trends, etc., and shall provide HUD with specified owner reports.

The HUD report will be transmitted to the PHA not later than ten (10) calendar days following the end of each quarter. The PHA shall complete its evaluations and analyses and submit a completed report to the CAOM within twenty (20) calendar days of receipt. The PHA will analyze the HUD report and assess the extent to which changes or trends may indicate increasing or decreasing risks to HUD, PHA, projects, owners, and/or tenants. The discussion may include descriptions of market conditions, employment trends, demographic trends, or special cases that are contributing to observed changes and trends. The discussion may include comparisons to previous quarters.

The Quarterly Risk Assessment Report will include the following:

A. HAP Contracts

HUD will provide data on:

1. Renewals within each quarter.

2. Terminations within each quarter.

3. Opt-Outs within each quarter.

The PHA will provide:

a. Analyses and discussion of the data.

b. Owner Opt-Out Report: List of owners, including contact name, address, project name, project address, HAP Contract Number, that opted-out of HAP Contracts along with a detailed description of all of the efforts made by the PHA to preserve all Section 8 project-based units and all the reasons for any units which opted out or otherwise were lost as section 8 project-based units. Such analysis and discussion shall include a review of the impact of the loss of any subsidized units in that housing marketplace, such as the impact of cost and the loss of available subsidized, low-income housing in areas with scarce housing resources for low-income families.

B. Covered Units:

HUD will provide data on:

1. Covered Units Receiving Subsidy.

2. Covered Units Vacant:

- 1st Month of Quarter.
- 2nd Month of Quarter.
- 3rd Month of Quarter.

The PHA will provide:

a. Analyses and discussion of the data.

b. Vacancy Report: List of owners, including contact name, address, project name, project address, HAP Contract Number, with ten (10%) or more [provide actual vacancy percentage] of covered units vacant all three (3) months of the quarter, and the reasons for sustained vacancies. Include a brief description of PHA and/or HUD actions taken or in process to compel owner to reduce vacancies.

C. Management & Occupancy Reviews (MORs)

HUD will provide data on:

1. MORs completed (report issued to owner) within quarter.

2. MORs issued rated less than "Satisfactory."

3. MORs issued with findings within quarter.

4. MORs closed within quarter.

The PHA will provide:

a. Analyses and discussion of the data.

b. MORs Open Findings Report: List of owners, including contact name, address, project name, project address, HAP Contract Number, with MOR findings not corrected within thirty (30) calendar days after report issued to owner, reasons for owner's failure to correct findings within thirty (30) days, the actual number of days required to correct, if corrected. Owners with findings that have not been corrected shall be reported each quarter until all corrective actions have been completed. Include a brief description of the status of PHA referrals to HUD for sanctions or enforcement.

D. REAC Inspections

HUD will provide data on:

1. REAC Inspections (report issued to owner) within quarter.

2. REAC Inspections with EH&S Deficiencies within quarter.

3. REAC Inspections with scores below sixty (60) within quarter.

The PHA will provide:

a. Analyses and discussion of the data.

b. REAC Inspections Report: List of owners, including contact name, address, project name, project address, HAP Contract Number, with REAC Inspections that included EH&S deficiencies and/or scores below sixty (60) during the quarter.

c. Notice of Default (NOD) of HAP Contract Report: List of owners, including contact name, address, project name, project address, HAP Contract Number, issued a NOD memorandum

during the quarter, the status of the owner's response, and a brief description the status of HUD enforcement actions.

E. Tenant Health, Safety, & Maintenance Issues

The PHA will provide:

a. Number of tenant health, safety, and maintenance issues logged and owner notified.

b. Number and percentage of tenant health, safety, and maintenance issues not corrected by owner within fifteen (15) days of owner notification.

c. Analyses and discussion of the data.

d. Tenant Health, Safety, and Maintenance Report: List of owners, including contact name, address, project name, project address, HAP Contract Number, that have been notified of tenant health, safety, and maintenance issues that the owner failed to correct within fifteen (15) calendar days of notification, reason for owner's failure to correct issues within fifteen (15) calendar days, the actual number of days required to correct, if corrected. Owners with HSM issues that have not been corrected shall be reported each quarter until all corrective actions have been completed. Include a brief description of the status of PHA referrals to HUD for sanctions or enforcement.

Performance Standards
• Monthly invoice is due to the CAOM by the tenth (10^{th}) business day of each month for the previous month's activity.
• Monthly Work Plan Report updates Annual Work Plan by documenting actual to planned services and activities to perform the PBTs and ACC for the month and year-to-date. Describes adjustments required for the remainder of the year to fully perform the PBTs and ACC. Due to the CAOM by tenth (10^{th}) business day following the end of the month.
• Complete Quarterly Risk Assessment Report and submit to the CAOM within twenty (20) calendar days of receipt from HUD following the end of each quarter within each twelve (12) month period of the ACC Term.

Quality Assurance:

On-Site Reviews

Data Systems Reports

Report Reviews

3.7. PBT #7 – Administration – ACC Year End Reports and Certifications

To track the performance of the Section 8 program, monitor and evaluate PHA performance, and identify technical assistance needs, HUD requires the PHA to annually report its contract administration activities. Therefore, the PHA must provide annual reports to the jurisdictional HUD office.

Outcome: HUD can monitor and evaluate program preparedness, performance, and costs from accurate, timely reports submitted by the PHA.

Annual Financial Operations Report & FTE Certification

Within sixty (60) calendar days of the ACC Year End, the PHA's CFO shall submit to HUD an Annual Financial Operations Report accompanied by supporting statements and schedules derived from the PHA's accounting systems. The CFO shall certify that the direct costs, indirect costs, and Administrative Fees Earned reported (Exhibit C), are complete and accurate for each twelve (12) month period of the ACC Term.

The Annual Financial Operations Report shall be accompanied by an FTE Certification. The FTE Certification shall identify\the actual FTEs required to perform PBTs numbers one (1) through six (6) as specified in Exhibit A of the ACC for each twelve (12) month period of the ACC Term. For each PBT, identify the positions by title responsible for managing, supervision, and performing each PBT. Include the FTEs for PHA and sub-contractor employees. Only include sub-contractors that contract directly with the PHA. Do not include sub-contractors of sub-contractors. One (1.00) FTE is defined as 2,080 work hours per year.

Annual Work Plan

- Sixty (60) calendar days prior to ACC Year End, the PHA must submit to HUD a report that describes its month-by-month work plan to fully perform all PBTs during the next twelve months of operation.
- Identify the processes required to perform each PBT and the principal point of contact, by name and title, responsible for managing each process.
- Describe process metrics providing input due date deadlines, when outputs are due and how the process manager and others in the organization know that the process was completed on time and according to its design.

Depository Financial Institution Certification

The PHA must submit to HUD an annual depository institution certification certifying that the depository institution was minimally acceptable by GNMA each quarter of the

fiscal year. If the rating was not minimally acceptable at any time during the fiscal year, the PHA must provide documentation verifying that it changed depository institutions.

Disaster Plan

The PHA shall provide HUD a PHA Disaster Plan that details how the PHA and, if applicable, subcontractors that perform fifty-percent (50%) or more of the PBTs under the ACC will continue to comply with the ACC and perform each PBT in the event of a natural or human caused disaster.

The PHA shall notify HUD of any incident that disrupts the PHA's performance under the ACC and within one (1) business day following such incident even if normal operations have resumed. The PHA shall inform HUD of the nature of the incident, the extent of its impact on the PHA's operations, what actions have been initiated in response to the incident, and the expected date of the resumption of normal operations. If the PHA determines, at any time during or following an incident, that it is unable to comply with any provision of the ACC and/or fully perform any PBT, the PHA shall notify HUD of its determination.

The PHA Disaster Plan shall cover the following topics in detail:

- Incident Response Staff: The names, titles, incident response authority and responsibilities, and contact information for assigned staff.

- Communication Back-up Plans and Systems:

    - Procedures and methods of notifying and updating owners, and residents regarding changes in service procedures and the resumption of routine operations.
    - Procedures and methods of notifying in the event of an incident, updating HUD regarding changes in service procedures until the resumption of routine operations, the performance status of each PBT or, if any PBT is not being fully performed, actions being taken to restore full performance of each PBT.

- Operating and Management Back-Up Plans and Systems: Procedures to relocate functions and staff to alternative office locations and/or telework sites; ensure access to IT systems; maintain internal and external communication systems (telephone, fax, email); and maintain supervisory, accounting, financial, and human resource functions.

- Information Technology (IT) Back-up Plans and Systems: Procedures to maintain IT staff support and ensure operability, data protection and system security.

- Preparedness: Plan to provide annual training for employees and, if applicable, subcontractor employees, and annual testing of back-up plans and systems.

The Disaster Plan shall be updated when changes occur and an up-to-date copy of the PHA's Disaster Plan provided to HUD. The PHA shall provide HUD a PHA Disaster Plan Certification (Exhibit D) sixty (60) calendar days prior to the ACC year end. The Disaster Plan Certification shall be signed by a Disaster Plan Coordinator who must meet the requirements of the State emergency management agency to develop, manage, and test disaster, continuity of operations, or emergency management plans for State agencies. The Disaster Plan Coordinator must attach a qualifications statement or resume to the certification

Performance Standards
• Annual Financial Operations Report (Exhibit C) submitted to HUD sixty (60) calendar days following the ACC year end.
• Annual Work Plan – Submitted to HUD sixty (60) calendar days prior to ACC year end.
• PHA Disaster Plan Certification (Exhibit D) submitted to HUD sixty (60) calendar days prior to the ACC year end.

Quality Assurance:

Monthly Invoice

Report Reviews

3.8. PBT # 8 – Annual Financial Reports – PHA FYE

Public Housing Agency audit and annual interest earned certification.

The PHA must maintain complete and accurate financial records covering the PHA's contract administration of Covered Units under the ACC.

Outcome: The PHA's records are complete and accurate.

Requirements:

PHA Audit

- Records concerning contract administration under the ACC must be distinct and separate from records concerning any other business of the PHA.

- The PHA must maintain complete and accurate records regarding activities relating to each HAP Contract for Covered Units.

- If the PHA is required to submit audited financial statements under OMB's Circular A-133, the PHA must submit audited annual financial statements that fully comply with the requirements of OMB Circular A-133 by the earlier of thirty (30) days after receipt of the auditor's report, or nine (9) months after the PHA FYE. This audit must be performed by an IA.

- If the PHA submits its audited financial statements more than sixty (60) days after the PHA fiscal year end, the PHA must submit all financial reports required by the HUD in unaudited form within sixty (60) days after the PHA FYE.

- The PHA's submission of financial information must also be in accordance with the requirements of HUD's Uniform Financial Reporting Standards (24 CFR, Part 5, Subpart H). The audit must be performed by an IA, procured using the standards in Circular A-133 and other documents referenced in Circular A-133.

- If a PHA is not required to submit separate audited financial statements under OMB's Circular A-133, it must submit unaudited annual financial statements within sixty (60) calendar days after the PHA FYE.

- If there are audit findings that require corrective actions, the PHA must provide HUD with a proposed plan of corrective actions as part of the audit submission package. By the first (1st) day of each month, until all corrective actions are completed as required by HUD, the PHA must submit a status report to HUD of corrective actions being implemented. Corrective actions must proceed as rapidly as possible. If the PHA fails to timely provide all required audited or unaudited financial statements, or fails to proceed with timely implementation of required corrective actions, HUD may determine that such failure is a default by the PHA under the ACC.

Annual Interest Earned Certification

The PHA must submit an annual interest earned certification certifying the amount of interest earned on HAP funds for the reporting period. Submissions will also be required for a negative report when the PHA does not have any interest to remit to the Department.

Depository Institution Certification

The PHA must submit an annual depository institution certification to the CAOM certifying that the depository institution was minimally acceptable by GNMA each quarter of the fiscal year. If the rating was not minimally acceptable, the PHA must provide the CAOM documentation verifying that it changed institutions and Depository Agreement in the form prescribed by HUD.

Reference:

ACC contract

HUD Handbook 7420.7

OMB Circular A-133

Performance Standards
• PHA Audit – PHAs that must comply with OMB's Circular A-133. The unaudited annual financial statements are submitted to HUD within sixty (60) calendar days after the PHA FYE and the audited annual financial statements are submitted to HUD within nine (9) calendar months after the PHA FYE. For PHAs that are not required to comply with OMB Circular A-133, unaudited annual financial statements are submitted to HUD within sixty (60) calendar days after the PHA FYE.
• Annual Interest Certification – Submitted to HUD within forty-five (45) calendar days after the end of the PHA FYE.
• Annual Depository Institution Certification – Submitted to HUD within forty-five (45) calendar days after the PHA FYE.

Quality Assurance:

Review of the audit

Unqualified audit opinion

4. ADMINISTRATIVE FEES

This section describes the types of Administrative Fees that may be earned by the PHA and the Disincentive Deductions that will be applied if the PHA does not attain the AQL specified for each PBT.

4.1. Basic Administrative Fee

The PHA earns a monthly Basic Administrative Fee based on the Basic Administrative Fee Percentage approved by HUD multiplied by the current 2-Bedroom FMR for each Covered Unit under on the first day of the month. A portion of the monthly Basic Administrative Fee is accrued for annual payment to the PHA when PBT number seven (7) and eight (8) are performed. The amount accrued is based on the Performance-Based Task Allocation Percentage specified in the PRS (Exhibit A, Section 6).

4.2. Disincentive Deductions

(1) The Basic Administrative Fee is subject to Disincentive Deductions if HUD determines that the acceptable quality standards for the PBTs specified in the PRS (Exhibit A, Section 6) have not been attained.

(2) If HUD determines that the PHA has performed below the AQL in any month, HUD will reduce the amount of the monthly Basic Administrative Fee by subtracting the amount of the Disincentive Deduction determined by HUD in accordance with the PRS. The Basic Administrative Fee less Disincentive Deductions is the Basic Administrative Fee Earned.

(3) The Basic Administrative Fee amount allocated to each PBT is determined by multiplying the Basic Administrative Fee by the Performance-Based Task Allocation Percentage as specified in the PRS.

(4) The Disincentive Deduction Percentage for each PBT is applied to the Basic Administrative Fee amount applicable to the PBT.

4.3. Annual Incentive Fees

(1) The PHA may earn an annual Incentive Fee for Customer Service that is equal to five (5) percent of the sum of the Basic Administrative Fee Earned during each twelve (12) month period of the ACC Term. Incentive Fee for Customer Service will be based on a survey of owners, management agents, and residents. The results of the survey will be evaluated to determine whether any Incentive Fee for Customer Service has been earned, based on established criteria.

(2) The PHA may earn annual Incentive Fees for Performance for twelve (12) months of one-hundred (100) percent AQL performance of PBT numbers one (1) through five (5) (Section 6). The incentive for each PBT is one (1) percent of the total Basic Administrative Fee Earned for each twelve (12) month period of the ACC Term.

4.4. Monthly, Quarterly, and Annual Evaluation of PHA Performance

During the ACC Term, HUD will conduct monthly, quarterly, and annual evaluations of the PHA's performance in contract administration of the Covered Units. Calculation of the amount of the Administrative Fee Amount Earned by the PHA is based on HUD's rating of the PHA's performance of the PBTs as specified in the PRS.

Each month, HUD evaluates the PHA's performance in completion of PBTs to determine the amount of the Basic Administrative Fee Earned for performance of each PBT. If performance is less than the AQL, Disincentive Deductions are applied to the monthly Basic Administrative Amount. This scoring is based on HUD's review of data

submitted and certified in the monthly invoice by the PHA and Annual Compliance Reviews.

4.5. Basic Administrative Fee Earned Payment

Each month, the PHA calculates the Basic Administrative Fee based upon the number of Covered Units under contract administration by the PHA on the first (1st) day of the month.

Column G of the PRS specifies whether the Basic Administrative Fee for a particular PBT is paid monthly or annually.

Each invoice for the Basic Administrative Fee Earned must be fully supported by documentation, as required by HUD, of the PHA's level of performance of each PBT. Such documentation shall be sufficient to show:

1. Whether the PHA has met the AQL for the performance standard (column C of the PRS).

2. The amount of any Disincentive Deductions (as calculated in accordance with column E of the PRS).

The PHA's determination of the Basic Administrative Fee Earned is subject to modification and adjustment as a result of HUD's quality assurance reviews. HUD may recover any overpayments, and may adjust amounts of payments against subsequent invoices to correct or adjust any overpayment or error in determination of any Basic Administrative Fee Earned.

5. PRS

The PRS specifies the AQL for performance of each PBT, the Performance-Based Allocation Percentage, the method used to evaluate performance, and the frequency with HUD will access and pay the Basic Administrative Fee Earned. The information in the PRS Table governs HUD's payment of Basic Administrative Fees Earned by the PHA for all work performed under the ACC. The PRS table is organize as follows:

1. Column A: PBT #;

2. Column B: PBT title and reference to Section Number in Exhibit A to the ACC;

3. Column C: AQL;

4. Column D: ALLOCATION PPERCENTAGE: The percentage of the monthly Basic Administrative Fee amount allocated to each PBT;

5. Column E: DISINCENTIVE DEDUCTION: The percentage by which the monthly Basic Administrative Fee amount allocated to the PBT is reduced for performance at less than the AQL;

6. Column F: QA: (Quality Assurance) Method is how HUD will assure the quality of the PHA's reported performance; and

7. Column G: ASSESSMENT AND PAYMENT FREQUENCY: Frequency (monthly or annually) with which HUD will access and pay the Basic Administrative Fee Earned for each PBT.

PRS TABLE						
A	B	C	D	E	F	G
PBT #	SOW	AQL	ALLOCATION PERCENTAGE	DISINCENTIVE DEDUCTION	QA METHOD	ASSESSMENT & PAYMENT FREQUENCY
1	Management & Occupancy Reviews (MOR) ACC Section 3.1.	95% Performance	20%	0.5% deduction for performance below the AQL.	On-site reviews. Data systems reports.	Monthly
2	Adjust Contract Rents ACC Section 3.2.	95% Performance	10%	0.5% deduction for performance below the AQL.	On-site reviews. Data systems reports.	Monthly
3	Review & Pay Monthly Vouchers. ACC Section 3.3.	95% Performance	20%	0.5% deduction for performance below the AQL.	On-site reviews. Data systems reports.	Monthly
4	Renew HAP Contracts & Process Contract Terminations or Expirations ACC Section 3.4.	95% Performance	20%	0.5% deduction for performance below the AQL.	On-site reviews. Data systems reports. Monthly invoice.	Monthly

PRS TABLE						
A	**B**	**C**	**D**	**E**	**F**	**G**
5	Tenant Health, Safety, & Maintenance Issues ACC Section 3.5.	95% Performance	10%	0.5% deduction for performance below the AQL.	On-site reviews. Monthly invoice.	Monthly
6	Administra-tion - Monthly & Quarterly Reports ACC Section 3.6.	100% Performance	10%	0.5% deduction for performance below the AQL.	On-site reviews. Data systems reports. Report reviews.	Monthly Quarterly
7	Administra-tion - ACC Year End Reports & Certifications ACC Section 3.7.	100% Performance	8%	For Annual Financial Operations Report & FTE Certification 4% Annual Work Plan 2% Annual Depository Institution Certification 1% Annual Disaster Plan Certification 1%	Monthly invoice. Report reviews.	Annually
8	Annual Financial Reports - PHA FYE ACC Section 3.8.	100% Performance	2%	PHA Audit 1% Annual interest earned certification 1%	Report reviews.	Annually

6. DATA SYSTEMS

6.1. Federal Requirements

The PHA must comply with all Federal data processing and data reporting requirements applicable to PHA functions under the ACC, including requirements for Public Housing Agencies described in 24 C.F.R. Part 208 ("Electronic Transmission of Required Data for Certification and Recertification and Subsidy Billing Procedures for Multifamily Subsidized Projects").

The PHA must have Internet Service Provider (ISP) access for electronic communication over the Internet with HUD, owners or others. The PHA must comply with HUD requirements for electronic communication (including requirements concerning email and other communication over the Internet). The PHA must comply with HUD requirements for data entry and data transfer over the Internet.
The PHA must ensure that all electronic data systems are virus free.
The PHA must have the capability to implement changes in data processing and data reporting procedures to comply with changes in HUD requirements. HUD will provide reasonable advance notice (by HUD directive to PHAs or otherwise) of changes in HUD requirements concerning automated data systems and automated data reporting. HUD will provide such advance notice a minimum of ninety (90) days before PHA compliance will be required.

6.2. Communication with Owners

The PHA must have the capability to receive resident certification and recertification data (Form HUD 50059) and voucher data (Form HUD 52670) electronically from owners in a form consistent with HUD reporting requirements for the HUD TRACS System. The PHA must have the capability, in the form acceptable to HUD, for communicating errors in Form HUD 50059 and Form HUD 52670 submissions to owners.

6.3. Communication with HUD

The PHA must provide HUD with data on HAP Contracts, rent adjustments and payments to owners, contract renewal processing, management and occupancy reviews, and other documents and information relevant to the PHA responsibilities outlined in the ACC. The PHA must have the capability to transmit data to HUD over the Internet as required by HUD. The PHA must have the capability to transmit Form HUD 50059 data to the HUD TRACS Tenant System and Form HUD 52670 data to the HUD TRACS. Voucher/Payment System to receive return messages transmitted from TRACS. The PHA's Internet access must provide the PHA with the capability to review the resident and voucher data that the PHA has transmitted to HUD, to ensure that the data maintained by HUD is correct and consistent with the data maintained in PHA files. Resident reporting requirements specified for HUD's TRACS Tenant System and voucher reporting requirements specified for the TRACS Voucher/Payment System are

published on the TRACS Documents Page on the World Wide Web. The PHA must meet the requirements specified in these documents. At this time, the PHA can access the TRACS Documents at the following URLs:
http://hudatwork.hud.gov/po/h/hm/tracs/trxhome.cfm and
http://hudatwork.hud.gov/lo/9/programoffices/mftracsaccess.cfm.

6.4. Electronic Fund Transfer and Payment

The PHA must have a depository account with a federally insured financial institution capable of receiving and sending electronic fund transfer (EFT) transactions. See also depository requirements at Section 5.b. of the ACC.

The PHA must have facilities acceptable to HUD for making timely and accurate housing assistance payments to owners. The PHA must also transmit interest earned statement to HUD via the Internet, or as otherwise specified by HUD.

7. QCP

When changes in the QCP occur, the QCP shall be updated and a copy shall be provided to the CAOM. The PHA QCP must address each the following elements and highlight changes.

- For each PBT, describe the internal control procedures that will be implemented to ensure that performance is maintained at the AQL specified in the SOW.
- Describe the internal control procedures that will be implemented to ensure accountability and separation of duties to detect and prevent potential fraud, waste, and abuse of funds.
- Identify internal control procedures to prevent, detect, and resolve actual or appearances of conflicts of interest as stipulated in Section 10 ("Conflict of Interest") of the ACC.
- Identify the internal control procedures to prevent, detect, record, and report information privacy breaches.
- Describe the internal control procedures for information and information system access, management, and security for HUD systems; non-HUD systems that contain program related data, and print-based program documents.
- Describe the internal control procedures to initially and continuously train and cross train staff to perform PBTs and comply with the requirements of the ACC and HUD.
- Describe the methodology that will be used to review, analyze, and evaluate the effectiveness of QCP; and the date(s) scheduled for each QCP Element review.

8. **CHANGE OF SUB-CONTRACTOR**

The PHA shall notify HUD sixty (60) calendar days prior to any change of a sub-contractor entity that performs fifty (50) percent or more of the FTEs required to perform PBTs numbers one (1) through six (6) under this ACC. The PHA shall submit a sub-contractor transition plan to transfer responsibility from incumbent sub-contractor and ensure continuity of operations. The PHA's plan must address the following:

a) Communication protocols with incumbent sub-contractor, HUD, owners, management agents, and tenants.

b) File and document transfer protocol (digital and print-based) with incumbent sub-contractor.

c) Work in process identification, reporting, management and transfer protocol for each PBT with incumbent sub-contractor.

d) Timeline and action plan to be one-hundred (100) percent ready to perform each PBT on the date specified in the timeline and action plan.

EXHIBIT B

HAP Contracts

Portfolio of HAP Contracts assigned under the ACC

EXHIBIT C

Annual Financial Operations Report & FTE Certification

Annual Financial Operations Report		
Organization:		
Certification: As Chief Financial Officer for the organization whose name appears above, I hereby certify that the financial information provided in this report and FTE Certification is accurate.		
Chief Financial Officer Name:	**For 12-Month Period Ending**	
Chief Financial Officer Signature:	**00/00/0000**	
Date:	**Percent of**	
Operating Cost Categories	**Total Costs**	**Total Costs**
1. Personnel: Direct Labor Costs	%	$
2. Fringe Benefits Costs	%	$
3. Travel Costs	%	$
4. Equipment Costs	%	$
5. Supplies and Materials Costs	%	$
6. Consultants Costs	%	$
7. Sub-Contractor Costs	%	$
8. Other Direct Costs	%	$
9. Indirect Costs for Facilities and Services	%	$
Total Costs (Categories 1-9)	100%	**$**
Administrative Fees:		
Basic Administrative Fees Earned	**$**	
Basic Administrative Fees Accrued	**$**	
Total Basic Administrative Fees Earned & Accrued		**$**
Less Total Costs		**$**
Net Basic Administrative Fees Earned & Accrued		**$**

Provide the following statements or schedules derived from the Public Housing Agency's budgeting and financial systems for each of the listed cost categories.

1. Personnel: Direct Labor Costs. List all individuals supporting the contract and their hourly wage or salary rate (use 2080 hours per year for salaried employees).

2. Fringe Benefits Costs. List of all individuals supporting the contract and their fringe benefits costs (use fringe benefits rates or actual costs per individual).

3. Travel Costs. Separately identify travel related to performance of the Performance-Based Tasks from other travel.

4. Equipment Costs. Itemized list of equipment and costs.

5. Supplies and Materials Costs. Itemized list of supplies and materials costs.

6. Consultants Costs. List of consultants by name plus services provided and costs.

7. Subcontractors Costs. List of sub-contractors by name plus services provided and costs.

8. Other Direct Costs. Itemized list of other direct costs.

9. Indirect Costs for Facilities and Services. Itemized list of departments or agencies providing services, including facilities, service type, and cost.

FTE Certification

The PHA shall submit a FTE Certification that identifies the actual FTEs required to perform PBTs numbers one (1) through six (6) as specified in Exhibit A of the ACC for each twelve (12) month period of the ACC Term. For each PBT, identify the positions by title responsible for managing, supervision, and performing each PBT. Include the FTEs for PHA and sub-contractor employees. Only include sub-contractors that contract directly with the PHA. Do not include sub-contractors of sub-contractors. One (1.00) FTE is defined as 2,080 work hours per year. The FTE Certification shall be in the following format with the actual number of Sub-contractors, if any, included in the table:

Identify the Sub-contractor(s) enumerated in the columns:
Sub-contractor #1: Name of Sub-contractor
Sub-contractor #2: Name of Sub-contractor
Sub-contractor #3: Name of Sub-contractor
Sub-contractor #4: Name of Sub-contractor
Add additional Sub-contractors to list and add additional columns to the table as required.

Positions and Full-Time Equivalents (FTEs)	Total FTEs	PHA FTEs	Sub-contractor #1 FTEs	Sub-contractor #2 FTEs	Sub-contractor #3 FTEs	Sub-contractor #4 FTEs
PBT #1 Management and Occupancy Reviews						
Position title 1	0.00	0.00	0.00	0.00	0.00	0.00
Position title 2	0.00	0.00	0.00	0.00	0.00	0.00
PBT #1 Total	0.00	0.00	0.00	0.00	0.00	0.00
PBT #2 Adjust Contract Rents						
Position title 1	0.00	0.00	0.00	0.00	0.00	0.00
Position title 2	0.00	0.00	0.00	0.00	0.00	0.00
PBT #2 Total	0.00	0.00	0.00	0.00	0.00	0.00
PBT #3 Review and Pay Monthly Vouchers						
Position title 1	0.00	0.00	0.00	0.00	0.00	0.00
Position title 2	0.00	0.00	0.00	0.00	0.00	0.00
PBT #3 Total	0.00	0.00	0.00	0.00	0.00	0.00

PBT #4 Renew HAP Contracts and Process Terminations or Expirations						
Position title 1	0.00	0.00	0.00	0.00	0.00	0.00
Position title 2	0.00	0.00	0.00	0.00	0.00	0.00
PBT #4 Total	0.00	0.00	0.00	0.00	0.00	0.00
PBT #5 Tenant Health, Safety, and Maintenance Issues						
Position title 1	0.00	0.00	0.00	0.00	0.00	0.00
Position title 2	0.00	0.00	0.00	0.00	0.00	0.00
PBT #5 Total	0.00	0.00	0.00	0.00	0.00	0.00
PBT #6 Administration - Monthly and Quarterly Reports						
Position title 1	0.00	0.00	0.00	0.00	0.00	0.00
Position title 2	0.00	0.00	0.00	0.00	0.00	0.00
PBT #6 Total	0.00	0.00	0.00	0.00	0.00	0.00
GRAND TOTAL FTEs	00.00	0.00	0.00	0.00	0.00	0.00
PERCENTAGE OF GRAND TOTAL FTEs	100.0%	0.0%	0.0%	0.0%	0.0%	0.0%

EXHIBIT D

DISASTER PLAN CERTIFICATION

This is to certify that I have reviewed the disaster plan for this organization and, if applicable, a sub-contractor entity that performs fifty (50%) percent or more of the FTEs required to perform PBTs numbers one (1) through six (6) under this ACC, and to best of my knowledge and belief:

(1) The disaster plan has been updated to reflect changes in personnel, policies, practices, backup plans, and resources.

(2) HUD has been provided a copy of the most recent disaster plan.

(3) All employees and, if applicable, sub-contractor employees have participated in disaster plan training within the past twelve (12) months.

(4) All backup plans and systems identified in the disaster plan have been tested within in the past twelve (12) months.

I declare that the foregoing is true and correct.

PHA Name: _____

Signature: _____

Name of Official: _____

Title: _____

Date of Execution: _____

Attach qualifications statement or resume of person executing this certification.

EXHIBIT E
SERVICE AREA

The Service Area is the State of _____.

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GOVERNMENT
Friday, July 22, 2011

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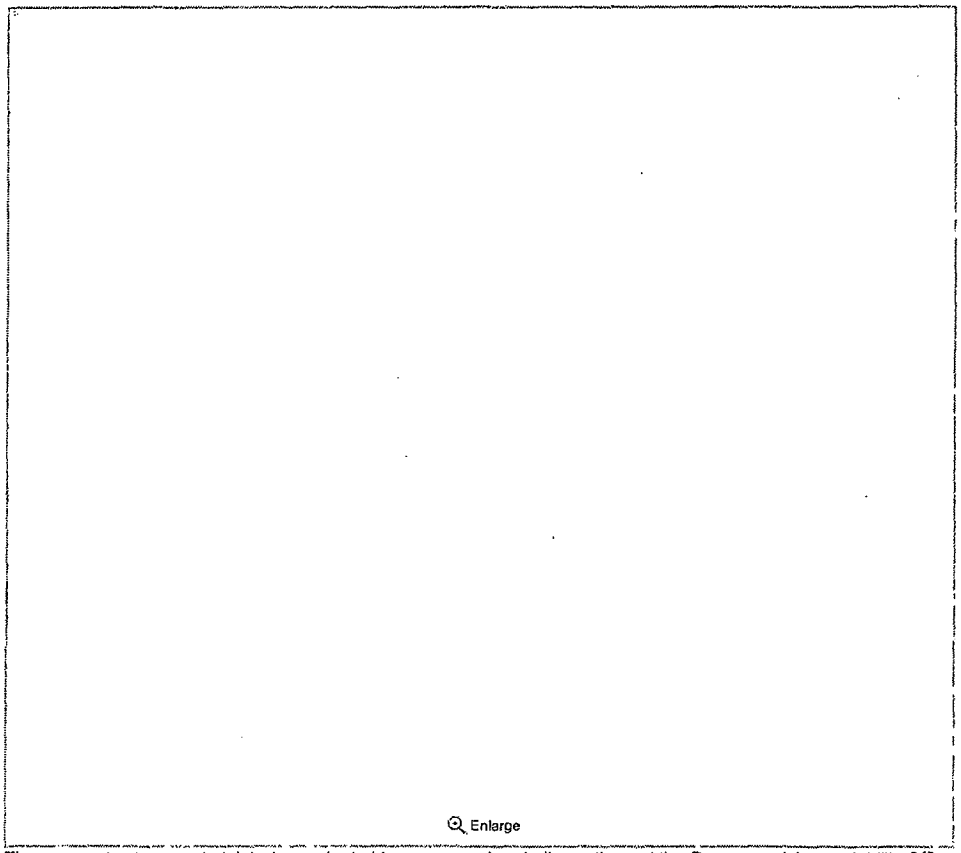
States Fight U.S. Housing Awards That Gave Akron NYC's Projects

By Leah Nylen | July 22, 2011 12:00AM ET

(Bloomberg) -- The U.S. government has decided that the housing authority of Akron, Ohio, should administer New York's federal rental-assistance program.

Idaho will manage programs in Arizona, Hawaii and Utah, according to the U.S. Department of Housing and Development, which stands to save $100 million a year in the shakeup, officials said.

More than a dozen state and local agencies will lose lucrative HUD contracts valued at $220 million a year to run low-income housing programs after the first full competition since 2000.



The new contracts, awarded July 1, may be held up as agencies challenge them at the Government Accountability Office, which adjudicates such disputes. So far, 12 losing agencies including New York have filed protests against 22 of the 53 awards.

The losing agencies may lose revenue, lay off employees or cut other low-income programs as a result of HUD's decision, officials said.

Oregon Housing and Community Services, which lost its contract to a unit of the Bremerton, Washington housing authority, may need to lay off as many as 24 employees if its protest doesn't succeed.

"The loss of this contract is going to significantly change the agency," Lisa Joyce, a spokeswoman for Oregon Housing and Community Services, said July 20. "We're going to have to restructure the way we're organized because of the loss of revenue" if Oregon's protest isn't successful, she said.

$20 Million in Fees

The agencies selected by HUD, called performance-based contract administrators, or PBCAs, process housing assistance payments and conduct management and occupancy reviews of public housing in their own and other states' project-based rental assistance under Section 8, the primary federal low-income housing program.

Only public housing agencies or state and local government organizations focused on low-income housing can compete to be PBCAs, which can hire companies as subcontractors to help perform the work.

Each contractor is paid a percentage of the fair market rent of all the units it administers. Under the previous contracts, awarded in 2000 and 2004, agencies could receive 3 percent of the rent of the units. Those fees can vary from several hundred thousand dollars to as much as $20 million, according to HUD.

Private Subcontractor

New York's Housing Trust Fund Corp. received $40.2 million in the 12-month period that ended Nov. 2010, Christopher Browne, a spokesman for the agency, said in an e-mail. About $13.7 million of that went to a private sector subcontractor, a unit of CGI Group Inc., and the agency used the rest to cover the program's costs and underwrite other affordable housing programs, he said.

Agency:
- Department of Housing and Urban Development

Companies:
- CGI Group Inc
- Pepper Hamilton LLP

Some state agencies used the revenue to fund other programs. Southwest Housing Compliance Corp., a non-profit associated with the Housing Authority of the City of Austin, lost the contract for Texas, which it had held since 2000. Its other five contracts won't make up for that loss of revenue, and the agency may need to cut programs it runs, such as scholarships for low-income students, said Michael Cunningham, a vice president for the non-profit, in an interview yesterday.

CGI, which said in January it had $40.3 million this year in management services subcontracts with five states, stands to lose because not all of its partners won new contracts.

$100 Million Savings

By holding a new competition, the agency will save more than $100 million a year, or about 30 percent of the costs, Carol Galante, the acting assistant secretary for HUD's Office of Housing, said in a July 14 interview.

"This is the first time HUD took a serious look at how to do this more cost efficiently while maintaining quality of service," Galante said. "Certainly, the budget environment gave added impetus," she said, though changes already were in the works.

Under the new contracts, the maximum fee was 2.5 percent. Successful bidders averaged 1.7 percent, Galante said.

To determine the winners, HUD scored agencies' proposals and then divided by the percentage fee the agency had bid, according to several people briefed by HUD on the competition. The Oregon agency bid 2.45 percent and the Bremerton unit bid about 1.88 percent, Oregon Housing's acting director Rick Crager said at a public meeting on July 15.

Summit Multi-Family Housing Corp., a unit of the Akron Housing Authority, beat out New York for the new contract, and won the contracts for New Jersey and Maryland.

New York's application scored a higher technical rating than the winner, Darryl C. Towns, the agency's commissioner, said in a July 11 letter to HUD Secretary Shaun Donovan.

"HUD failed to disclose the relative importance that it would give to the price," Towns wrote. New York's application "was materially prejudiced by HUD's failure" to reveal how much importance it placed on price.

State agencies in Arizona, Delaware, Kansas, Maryland, Massachusetts, New Jersey, and Rhode Island, as well as New York and Oregon, filed protests at GAO.

Other organizations associated with local housing authorities also protested: Columbus, Ohio; Oakland, California; and National Housing Compliance, an association of several authorities in Georgia. GAO has to decide on the protests by mid-October.

Largest Provider

In 2009, the CGI unit was one of the largest providers of PBCA services, working with agencies in California, Florida, New York, Ohio, and Washington, D.C., to administer about 25 percent of the projects involved. In January, the company signed contract renewals valued at $40.3 million to continue performing the services through Sept. 30.

All five agencies that CGI partnered with failed to win contracts in their home state, though the Florida agency won awards in Georgia and the Virgin Islands. Linda Odorisio, a spokeswoman for CGI, declined to comment.

Quadel Consulting Corp., a closely held company in Washington, D.C., was the biggest private sector winner, partnering with successful bidders in eight jurisdictions including Indiana, North Carolina, Ohio, Washington, D.C., Illinois, Virginia, Texas, and Washington state. Six of those contracts are under protest at GAO. Al Hardy, a spokesman for Quadel, didn't respond to a request for comment.

Southwest of Austin and Jefferson County Assisted Housing Corp., a non-profit associated with the Jefferson County Housing Authority in Birmingham, Alabama, won the most contracts at five each. Three of the Jefferson County contracts and one of Southwest's are facing protests.

The Idaho Housing and Finance Association won three new contracts and will provide services to more than 18,000 units in Arizona, Hawaii, Idaho and Utah, said Sheryl Putnam, housing compliance and program support manager for the association, in a July 20 phone interview. One of Idaho's awards is under protest.

Spokespersons for agencies in Massachusetts, Kansas, Rhode Island, and Georgia declined to comment, citing the protests.

Agencies in New Jersey, Akron, Ohio, Birmingham, Alabama and Oakland, California didn't respond to requests for comment.

To contact the reporter on this story: Leah Nylen in Washington at lnylen@bloomberg.net

To contact the editor responsible for this story: Anne Laurent at Alaurent7@bloomberg.net

MORE FROM BGOV

1. OBJECTIVES

1.1. Programmatic Objectives: HUD seeks to achieve three programmatic objectives.

- Calculate and pay Section 8 rental subsidies correctly.
- Administer project-based Section 8 HAP Contract consistently.
- Take actions to ensure that owners fulfill their obligations to provide decent housing for eligible families.

1.2. Administrative Objectives: HUD seeks to achieve three administrative objectives.

- Execute an ACC only with a PHA that has the qualifications and expertise to oversee and manage affordable housing, and that has the capacity to perform the required contract administration services, including necessary personnel and other resources.
- Get the best value for dollars spent for PHA services.
- Encourage the development of joint ventures and or partnerships for contract administration services to obtain the benefit of the best practices of both public and private sectors.

2. PHA CERTIFICATION

The entity executing the ACC with HUD certifies that is a "public housing agency," as defined in section 3(b)(6)(A) of the 1937 Act, 42 U.S.C. section 1437a(b)(6)(A), and that it satisfies all legal requirements set forth in the Notice of Funding Availability for the Performance-Based Contract Administrator Program. The entity executing the ACC with HUD further certifies that it will continue to satisfy the above-referenced definition of "public housing agency" and that it will remain in compliance with the foregoing requirements throughout the ACC Term.

3. PBTs

This section describes the eight (8) PBTs that the PHA must perform.

1. Management and Occupancy Reviews.
2. Adjust Contract Rents.
3. Review and Pay Monthly Vouchers.
4. Renew HAP Contracts and Process Terminations or Expirations.
5. Tenant Health, Safety, and Maintenance Issues.

PATTON BOGGS LLP

2550 M Street, NW
Washington, DC 20037-1350
202-457-6000

Facsimile 202-457-6315
www.pattonboggs.com

Robert K. Tompkins
202-457-6168
rtompkins@pattonboggs.com

February 22, 2012

The Honorable Helen R. Kanovsky
General Counsel
U.S. Department of Housing & Urban Development
451 7th Street, SW
Washington, D.C. 20410

Re: HUD Performance Based Contract Administrator Contracts

Dear Ms. Kanovsky:

We represent The Jefferson County Assisted Housing Corporation (JeffCo). JeffCo is an "instrumentality" public housing agency (PHA) within the meaning of the U.S. Housing Act of 1937 (the 1937 Act). We are writing with respect to HUD's anticipated Notice of Funding Availability (NOFA) for its Performance Based Contract Administrators (PBCA) program contracts for Section 8 project-based subsidy payments and are concerned about the integrity of the NOFA process, particularly as it relates to the issue identified below.

JeffCo has successfully performed HUD PBCA contracts in several states for many years. JeffCo submitted several applications pursuant to the 2011 Invitation for Applications and was designated as an awardee of PBCA contracts in six states. All six of the contracts HUD awarded to JeffCo were protested to the Government Accountability Office (GAO) and subsequently cancelled as a result of HUD's corrective action in the GAO protests. JeffCo continues to perform on its pre-existing PBCA contracts in four states and intends to apply for new PBCA contracts once HUD issues its NOFA.

We are concerned about efforts to influence the formulation of the NOFA, and in particular the submission to HUD of what purport to be opinion letters from state Attorneys General (AGs) regarding eligibility for performing PBCA contracts in their states. As set out below, we believe these AG letters are biased, of limited or no legal effect, and simply wrong in their conclusions.

As far as we know, HUD has not solicited input from the general public or interested parties with respect to the formulation of the NOFA. That said, it is obvious that some parties are engaged in an aggressive advocacy campaign on this very issue and at least two of the AG letters were addressed to, and presumably received by, HUD. If HUD is doing so, then it should provide appropriate notice to all interested parties and the general public and provide them with an opportunity to be heard.

Since certain parties have aggressively offered opinions regarding PBCA eligibility requirements, we would like to delineate the following flaws in their arguments:

- The reasoning and analysis offered in the AG letters is fundamentally flawed and their conclusions are wrong. Among other things, the letters conflate the meaning of a "public housing authority" under state law and a "public housing agency" under the 1937 Act. The letters then conclude that an entity cannot serve as a "public housing agency" unless they are licensed as a "public housing authority" in the state. This is a distortion of federal and state law.

- The effect of the letters is of limited significance. For example, attorneys general generally do not possess the power under their state Constitutions to declare what the law is; that power is reserved to the legislature and to the courts. These letters do not carry any real legal effect and are at best advisory in nature.

- The letters are the result of the advocacy of the state HFAs and are based upon the slanted set of facts and law presented by the state HFAs to the AGs. They are not based upon an objective, disinterested and reasoned approach to the issue by the AGs. Further to this point, in several cases it is clear the AGs regard the state HFAs as their "clients" and their work product is intended to advocate for the interests of their clients, not provide an objective view of relevant law.

JeffCo's legal team has done extensive research in numerous states on this subject and would be happy to provide the Department with that information should it be deemed appropriate and useful.

We greatly appreciate all of your efforts to maintain a level playing field in the NOFA process to ensure that HUD gets the best value for its PBCA program dollars and that the affected owners, managers, and residents get the service and support that they deserve.

Respectfully submitted,

Robert K. Tompkins
Counsel to the Jefferson County Assisted Housing Corporation

PATTON BOGGS LLP

2550 M Street, NW
Washington, DC 20037-1350
202-457-6000

Facsimile 202-457-6315
www.pattonboggs.com

Robert K. Tompkins
202-457-6168
rtompkins@pattonboggs.com

April 23, 2012

VIA EMAIL AND FEDEX

Ms. Carol J. Galante
Acting Assistant Secretary for Housing and
Federal Housing Administration Commissioner
U.S. Department of Housing & Urban Development
451 7th Street, SW
Washington, DC

RE: HUD's Fiscal Year (FY) 2012 Notice of Funding Availability (NOFA) for the Performance-Based Contract Administrator (PBCA) Program for the Administration of Project-Based Section 8 Housing Assistance Payments Contracts

Dear Ms. Galante:

This firm represents The Jefferson County Assisted Housing Corporation (JeffCo), a public housing agency (PHA) within the meaning of the U.S. Housing Act of 1937 (the 1937 Act). We are writing with respect to HUD's recently released NOFA for the PBCA program contracts. We have significant concerns as to the legal validity of the NOFA and as to the preparation and release of the NOFA, particularly as it relates to the NOFA's significant limitations on competition and its creation of sole source contracting arrangements in many states. These concerns are detailed below, but in a nutshell JeffCo requests nothing more than the right to continue to compete on equal footing with other PHAs to serve HUD as a contracting partner in the PBCA program.

As discussed below, the NOFA is fatally defective in several respects. For these and the other reasons stated in our February 22 letter to HUD's General Counsel, Ms. Helen Kanovsky, we respectfully request that the Department withdraw the NOFA and amend it to conform with applicable laws, HUD regulations, and sound public policy.

JeffCo has successfully performed HUD PBCA contracts in several states, including in its home state of Alabama and in other states, for many years. JeffCo submitted several applications pursuant to HUD's 2011 Invitation for Applications and was designated as an awardee of PBCA contracts in six states, two more states than it currently administers for HUD. As evidenced by HUD's selection of JeffCo at the time, JeffCo's proposals offered HUD a better value at a lower cost than the other bidders in those states, many of which included the in-state housing finance agencies (HFAs).

As you know, at least 42 PBCA contracts, including all six of the contracts HUD awarded to JeffCo, were protested to the U.S. Government Accountability Office (GAO) and subsequently cancelled by HUD as a result of HUD's corrective action in the face of the protests. JeffCo continues to perform on its pre-existing contracts in four states and intends to apply for multiple PBCA contracts in response to the NOFA. Unfortunately, the NOFA is stacked against JeffCo and other non-HFAs in a variety of ways, including that it effectively precludes JeffCo and other out-of-state PHAs from competing by creating sole source arrangements for "in-state" PHAs like HFAs in many states. As set forth below, there is no apparent legal basis for HUD to make this distinction between in-state and out-of-state PHAs. The distinction also marks a significant change in HUD policy in the implementation of the PBCA program despite there being no change in the relevant statutes, no court decisions dictating or authorizing a change and no public rule making by HUD to effect a change in policy.

The net effect of HUD's overly restrictive, in-state-only requirement will be to seriously curtail competition, and in many cases to create sole source contracting arrangements. HUD's anti-competitive approach is directly at odds with clear public policy favoring competition both in procurement contracts and in non-formula federal assistance agreements. It is also at odds with statutory authority, including the Federal Grant and Cooperative Agreement Act, 31 U.S.C. § 6301 *et seq.*, the Competition in Contracting Act, 41 U.S.C. § 3301, and HUD's own stated policies for competitive grants including the HUD "Policy Requirements and General Section to HUD's FY 2012 NOFA's for Discretionary Programs."

This shift in policy is particularly surprising given the oversight history of the PBCA program and the reported waste of taxpayer dollars that has occurred. Numerous investigations and reports of the OIG have underscored these problems and have ascribed them to inadequate oversight by HUD and a lack of competition in the PBCA program. In response HUD has committed to ensuring more, not less, competition. For example, in late 2009 the OIG issued a report noting that HUD did not obtain best value through its PBCA contracts and was wasting *at least* $7.6 million per year as a result. *See* "HUD's Performance Based Contract Assistance Program Was Not Cost Effective," OIG Report No. 2010-LA-0001, November 12, 2009, p. 6. HUD's response to the OIG, which is incorporated in the report, stated that HUD's plan to address these failings included:

* obtaining "market driven" savings through *competition*,
* *increasing* the number of applicants, and
* having PBCAs be "operational in *various geographical service areas*" to obtain "cost efficiencies with economies of scale."

Id., p. 31 (emphasis added).

However, through the NOFA HUD is taking precisely the opposite approach by eliminating competition in favor of sole source arrangements, decreasing the number of eligible applicants, and eliminating economies of scale by limiting PHAs to performing in a single state and refusing to allow them to cross state lines to achieve the efficiencies noted.

It is significant that HUD's attempts to restrict and eliminate competition are not the result of any change in law, any court decision, any formal rule making announcing a change in policy, or any legitimate policy reason such as improving services or saving taxpayer dollars. Rather, it appears that this restrictive change has been spurred solely by the advocacy and lobbying efforts of one set of interested parties – the HFAs, their advocates and their lawyers.

These changes represent more than just a bad idea. They are beset with legal flaws that make the NOFA and the underlying policy HUD is attempting to implement arbitrary and capricious, without rational basis, and not in accordance with law. Set forth below are a number of the important legal flaws with this NOFA and we respectfully request that it be withdrawn and that HUD take the other actions identified herein.

1. The U.S. Housing Act of 1937 does not permit HUD to distinguish among public housing agencies in the matter in which it has attempted to.

In years of operating the PBCA program, HUD has never drawn any eligibility distinction between PHAs, be it on the basis of geography or otherwise. Consistent with this long-standing past practice HUD correctly notes in the NOFA that "nothing in the 1937 Act prohibits an instrumentality PHA...from acting as a PHA in a foreign state." NOFA, p. 4.

However, without explanation, HUD has for the first time added a new, highly restrictive eligibility requirement by stating that it will consider applications from out-of-state applicants only if there is no legally qualified in-state applicant. *Id.* Neither Section 3(b)(6)(A), Section 8 nor any other provision of the 1937 Act provides any basis for such a restriction, and HUD does not even attempt to invent or offer such a basis in the NOFA.

Section 3(b)(6)(A) provides that a "public housing agency" is "any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof)..." (emphasis added). It makes no distinction between PHAs and does not provide HUD any discretion to alter or amend the definition of a PHA. It certainly does not provide for any discrimination based on whether a PHA is an in-state or out-of-state entity. Given this, it is not surprising that HUD has not even attempted to articulate a rationale in the NOFA for limiting the universe of eligible PHAs. The statutory definition is unequivocal: a public housing agency is a public housing agency.

Similarly, Section 8 simply authorizes HUD to enter into annual contribution contracts with public housing agencies. It imposes no limitations on PHA eligibility to contract with HUD, and the statute gives HUD no authority to arbitrarily impose one.

The purported limitation on eligible PHAs is contrary to the enabling statute and HUD lacks the authority or discretion to change it. For each of these reasons, we respectfully request HUD withdraw the NOFA and take the other actions identified herein.

2. HUD's attempt to make this distinction is arbitrary and capricious and therefore contrary to law.

As noted above, HUD has offered no rationale in the NOFA – legal or factual – for the distinction between in-state and out-of-state PHAs. HUD has acknowledged, correctly, that an out-of-state PHA is legally authorized to be a PHA in a foreign State on the same basis as an in-state PHA. NOFA, p. 4. However, without explanation, HUD overrides this established point of law and purports to effectively limit the universe of eligible PHAs to in-state PHAs. *Id.* Even if HUD were afforded the discretion to re-define the eligibility of PHAs, it cannot do so arbitrarily. Yet HUD has made no effort to justify this decision in the NOFA. There is no evidence that out-of-state PHAs are less competent than in-state PHAs. Indeed, JeffCo's record over the years is a testimony to the outstanding job that out-of-state PHAs do on behalf of HUD. To the contrary, there is significant publicly available information of performance problems by in-state PHA's, including as noted by the OIG. To the contrary, there is significant publicly available information of performance problems by in-state PHA's, including as noted by the OIG. *E.g.*, 'HUD's Performance Based Contract Assistance Program Was Not Cost Effective," OIG Report No. 2010-LA-0001, November 12, 2009; "HUD's Monitoring of the Performance-Based Contract Administrators Was Inadequate," OIG Report No. 2009-SE-003, September 1, 2009; "HUD's Recent Performance-Based Contract Administration Activity Was Inconsistent with Agreed-Upon Management Decisions between HUD and HUD OIG on Audit Report 2007-SE-0001, Dated June 7, 2007," Memorandum No. 2009-SE-0891, December 8, 2008; "HUD Did Not Ensure That Payments to Contract Administrators Were for Work Performed or That Interest Was Earned on Advances and Recovered," OIG Report No. 2007-SE-0001, June 7, 2007. The absence of any justification for the distinction between in-state and out-of-state PHAs emphasizes the arbitrary nature of HUD's decision.

Since the effort to restrict the universe of eligible PHAs is arbitrary and capricious, it is contrary to law. For this reason, we respectfully request HUD withdraw the NOFA and take the other actions identified herein.

3. The restriction on out-of-state PHAs will reduce competition and increase costs.

As discussed above, HUD's approach will eliminate competition and reduce the PBCA program in many states to sole source contracting arrangements. This appears to be precisely the objective of the HFAs based on the legal positions offered by their legal counsel – the state attorneys general in several states – who generally opine that only their clients, the in-state HFAs, are qualified to operate as PHAs on a state-wide basis in their state. As discussed below and in

previous correspondence, these attorney general letters are fundamentally flawed and their clear intent is to establish sole source arrangements for their clients – the HFAs.

Sole source arrangements, or even reduced competition, will lead to increased costs for the program as a restricted universe of bidders, especially those bidders who believe themselves to be the only eligible PHA, will be inclined to maximize the Administrative Fee that they propose. Given that HUD has already announced it will pay up to a two-percent fee, there's absolutely no incentive for these potential sole source awardees to manage their proposed costs.

In fact HUD has acknowledged that it plans to pay the full two-percent regardless of actual costs and in abdication of its fiscal responsibility. (See Answer to Question 119: "HUD finds any proposed Administrative Fee within the 2% cap...to be a reasonable fee for service.") In the following sentence HUD notes "any portion of the Administrative Fee in excess of the PBCA's costs incurred will be considered non-program income." *Id.* HUD has clearly invited the in-state HFA to inflate its proposed Administrative Fee to two percent regardless of the actual costs of performing the PBCA contracts. Establishing an arrangement where the Administrative Fee bears no rational relationship to the actual costs of performance renders the two-percent fee unreasonable *per se*.

HUD has also now confirmed that PBCA contract awardees can subcontract 100% of the work under the PBCA contracts to other entities. See, e.g., Answer to Question 124. As revealed in the GAO protest process in 2011, many PBCA contract awardees subcontract all or substantially all of the required work including the performance-based tasks. In many cases these pass-through arrangements are with private contractors which are not only out-of-state entities, but which do not meet the definition of a PHA under federal law.

As noted below, HUD's position on subcontracting is in direct conflict with its prohibition on crossing state lines. HUD's asserted position that only an in-state, state-wide PHA is legally eligible to perform the PBCA contract in its state is irreconcilable with its position that the same PHA can in turn subcontract out 100% of work, not only to an out-of-state entity, but to a non-PHA entity at that. HUD's position on subcontracting demonstrates that there is no rational basis for the proposed in-state only requirement.

In addition, this proposed approach is a clear waste of taxpayer funds, at a time when federal expenditures, and especially those for assisted housing, are coming under increased pressure.

This restriction on competition is contrary to the Federal Grant and Cooperative Agreement Act of 1977, pursuant to which this NOFA is being issued. One of the principal purposes of that Act is "to encourage competition in making grants in cooperative agreements." 31 U.S.C. § 6301(3). It also directly conflicts with HUD's own regulations on grant and cooperative agreement procurement, 24 CFR Part 85, although HUD has purported – also without explanation – to exempt this NOFA from those provisions.

Quite simply, it appears that HUD is attempting to limit or eliminate competition to ensure that a favored class of applicants receives the PBCA contracts. HUD has invited those favored applicants to inflate the price of their proposals, irrespective of actual cost, and then left them to divvy up the profits with their contracting partners, who HUD has acknowledged may perform all of the actual work. The end result will be increased costs and less competent performance. HUD has offered no justification for such a waste of taxpayer dollars nor is there any justification that could be offered.

For this further reason, we respectfully request that the NOFA be withdrawn and that HUD take the other actions identified herein.

4. **The NOFA reinforces the concerns raised in our February 22, 2012 letter to HUD.**

We continue to have significant concerns regarding the issues identified in our letter of February 22, 2012, addressed to the Department's General Counsel, Ms. Kanovsky. (Courtesy copy attached as Attachment A.)

First, HUD has incorporated several letters from state attorneys general into the NOFA process. HUD has not explained why these letters are included in the NOFA or what weight HUD intends to afford them. As discussed in our prior letter, these opinions are fundamentally flawed and are the product of an advocacy effort by the clients of the attorneys general – the HFAs.

Moreover, it appears that HUD has not merely been a passive recipient of these letters. For example, the November 4, 2011 letter from the Oregon Attorney General is sent on behalf of its client the Oregon Housing and Community Services Department (OCHS). That letter is itself in response to a letter sent by the Department's then-Acting Deputy Assistant Secretary for Multifamily Housing, Janet Golrick, to the Oregon Attorney General's office seeking "clarification" of a prior views letter. It appears the Department has been actively soliciting views from state attorneys general. It is also noteworthy, that while HUD has posted the end-product offered by the attorneys general, it has not posted the various correspondence, including from HUD, as well as shared research, drafts, questions, etc. that underlie the resulting opinions. HUD should do so. JeffCo specifically raised this issue, and requested that HUD make the complete correspondence file available, in questions submitted pursuant to the instructions in the NOFA on or about March 27. HUD has not responded to or complied with this request as of the date of this letter.

Second, it is abundantly clear that the material shifts in the Department's PCBA eligibility requirements and the corresponding significant changes in the NOFA are the result of numerous meetings and communications between the Department and the advocates for the HFA community, including their trade association, their counsel (the state attorneys general) and likely others. We are also aware of numerous direct meetings between high level Department

personnel and the HFA community. As noted above, it appears that the Department has actively sought input from these interested parties and their counsel without offering the same opportunity to be heard to other eligible PHAs.

Senior HUD officials have acknowledged that the agency has been subjected to heavy lobbying from the HFAs and their supporters. The HFAs' lobbying efforts have had an obvious impact on HUD's administration of the PBCA program and the terms of the NOFA. Not surprisingly, it appears the changes all inure to the benefit of those who had access to the Department. Unfortunately, the Department has not arrived at these policy and programmatic changes, including the formulation of the NOFA, through a fair and open process. Among other things, this selective, non-inclusive and non-transparent process is itself arbitrary and capricious.

Third, despite the fact that these state attorney general letters began to be submitted as long ago as August 2011, the HFA industry has only been able to muster letters from seven out of the 42 states and jurisdictions subject to the NOFA. Even assuming these letters raised substantively valid points, which they do not, it is patently unreasonable for HUD to create a nation-wide policy of exclusion based on letters which come from barely 15% of the states covered by the NOFA. This is particularly so given that the letters, by their terms, are state-specific and the attorneys general lack any authority to opine on or construe issues of federal law.

Fourth, JeffCo is not aware of, and HUD has not identified, any situation where an out-of-state PHA has actually been sued – either by a state attorney general or an in-state HFA – on the basis that state law prohibits their performance of a PBCA contract. Out-of-state PHAs have performed PBCA contracts for years without any such challenge, including in at least one of the states for which attorney general letters have been provided. Not only are the attorney general letters of no real effect but there's no basis for asserting a credible litigation risk associated with utilizing out-of-state PHAs, either from those letters or otherwise. The contrived assertion of litigation risk appears to be nothing but an artificial attempt to create a rational basis for HUD's ill-founded restriction on competition.

Fifth, as noted above, the NOFA allows a PBCA awardee to subcontract out ALL of the work called for under the contracts in question to non-PHA "contractors." (See, e.g., Answer to Question 124: Please confirm that the NOFA does not place any limitation on the amount of work which may be subcontracted to another entity; Answer: Correct.) This is directly at odds with the position espoused by the state attorneys general and embraced by HUD, that only the in-state, state-wide HFA is authorized by state law to perform the PBCA contract. HUD's acknowledgement that there is no limit on the amount of subcontracting that can occur is a direct admission that there is nothing inherently governmental or reserved to HFAs about the work in question and that the attorney general letters are of no real effect. This logical flaw alone clearly shows that there is no rational basis for the restrictive provisions set forth in the NOFA.

Finally, in those states where JeffCo intends to submit a proposal and where HUD has identified an attorney general letter, JeffCo's in-state counsel will be providing a response detailing the significant procedural and substantive defects in those letters. For each of these reasons, we respectfully request that HUD withdraw the NOFA and take the other actions identified herein.

5. The state attorney general letters are fundamentally flawed.

In addition to the fundamental flaws identified above, each of the attorney general letters suffers from additional fatal errors. The Kentucky Attorney General's letter illustrates this point. For example, the letter itself declares that it "not a formal opinion of this office." The analysis that follows this declaration misconstrues or ignores significant issues of state and federal law, as well as other opinions of the Kentucky Attorney General's office. A more detailed response to this letter is attached as Attachment B. Any reliance on this document is on its face inappropriate. The other attorney general letters suffer from the same or similar defects. For these reasons, we respectfully request that HUD withdraw the NOFA and take the other actions identified herein.

Conclusion

As a fundamental matter of due process and to correct the legal deficiencies identified above, we respectfully request that HUD undertake the following:

- withdraw the NOFA;
- make public all communications to or from the Department related to the PBCA program, including but not limited to the NOFA, together with all related documents;
- provide to the public a complete written summary of its proposed changes to the PBCA program;
- provide to the public a detailed summary of the factual and legal bases for the proposed changes;
- provide to the public a reasonable period of time to comment on these proposed changes through the submission of written comments and testimony;
- give due consideration to all views prior to finalizing any such changes; and
- issue an appropriate, revised NOFA or other form of solicitation.

Our client, JeffCo, values its decades-long relationship with HUD. We hope the NOFA will be re-formulated in a transparent, fair and equitable manner in order that JeffCo and other PHAs can continue to provide value-driven services to the Department, the owners, managers

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and residents of the Section 8 portfolio. Given the current NOFA due date of June 12, 2012, we respectfully request that you provide a response within 15 days of this letter. If we can provide any additional information, please do not hesitate to contact us. Thank you for your consideration to JeffCo's significant concerns.

Sincerely,

Robert K. Tompkins

Robert K. Tompkins

cc: The Honorable Helen R. Kanovsky

Attachments (2)

ATTACHMENT A

February 22, 2012 Letter to Hon. Helen R. Kanovsky

PATTON BOGGS LLP

2550 M Street, NW
Washington, DC 20037-1350
202-457-6000

Facsimile 202-457-6315
www.pattonboggs.com

Robert K. Tompkins
202-457-6168
rtompkins@pattonboggs.com

February 22, 2012

The Honorable Helen R. Kanovsky
General Counsel
U.S. Department of Housing & Urban Development
451 7th Street, SW
Washington, D.C. 20410

Re: HUD Performance Based Contract Administrator Contracts

Dear Ms. Kanovsky:

We represent The Jefferson County Assisted Housing Corporation (JeffCo). JeffCo is an "instrumentality" public housing agency (PHA) within the meaning of the U.S. Housing Act of 1937 (the 1937 Act). We are writing with respect to HUD's anticipated Notice of Funding Availability (NOFA) for its Performance Based Contract Administrators (PBCA) program contracts for Section 8 project-based subsidy payments and are concerned about the integrity of the NOFA process, particularly as it relates to the issue identified below.

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We are concerned about efforts to influence the formulation of the NOFA, and in particular the submission to HUD of what purport to be opinion letters from state Attorneys General (AGs) regarding eligibility for performing PBCA contracts in their states. As set out below, we believe these AG letters are biased, of limited or no legal effect, and simply wrong in their conclusions.

As far as we know, HUD has not solicited input from the general public or interested parties with respect to the formulation of the NOFA. That said, it is obvious that some parties are engaged in an aggressive advocacy campaign on this very issue and at least two of the AG letters were addressed to, and presumably received by, HUD. If HUD is doing so, then it should provide appropriate notice to all interested parties and the general public and provide them with an opportunity to be heard.

PATTON BOGGS LLP
ATTORNEYS AT LAW

Since certain parties have aggressively offered opinions regarding PBCA eligibility requirements, we would like to delineate the following flaws in their arguments:

- The reasoning and analysis offered in the AG letters is fundamentally flawed and their conclusions are wrong. Among other things, the letters conflate the meaning of a "public housing authority" under state law and a "public housing agency" under the 1937 Act. The letters then conclude that an entity cannot serve as a "public housing agency" unless they are licensed as a "public housing authority" in the state. This is a distortion of federal and state law.

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JeffCo's legal team has done extensive research in numerous states on this subject and would be happy to provide the Department with that information should it be deemed appropriate and useful.

We greatly appreciate all of your efforts to maintain a level playing field in the NOFA process to ensure that HUD gets the best value for its PBCA program dollars and that the affected owners, managers, and residents get the service and support that they deserve.

Respectfully submitted,

Robert K. Tompkins
Counsel to the Jefferson County Assisted Housing Corporation

ATTACHMENT B

Frost, Brown, Todd Response to Kentucky Attorney General Letter

Frost Brown Todd LLC
ATTORNEYS

Cory J. Skolnick
Member
502.568.0254 (t)
502.581.1087 (f)
cskolnick@fbtlaw.com

December 1, 2011

Via UPS Next-Day Air

James M. Herrick
Assistant Attorney General
Office of the Attorney General
Commonwealth of Kentucky
Capitol Building, Suite 118
700 Capitol Avenue
Frankfort, Kentucky 40601

Re: Project-Based Section 8 Rental Assistance Contracts Views Letter

Dear Mr. Herrick:

We are writing to respectfully request that the Office of the Attorney General withdraw a views letter issued to Ms. Karen Quinn, Deputy General Counsel of the Kentucky Housing Corporation, on October 13 (the "Letter"), a copy of which is attached hereto as Exhibit A. The Letter concludes that "the Kentucky Housing Corporation (KHC) is the only agency with authority under Kentucky law to administer project-based Section 8 rental assistance contracts with the United States Department of Housing and Urban Development (HUD) in Kentucky." Exhibit A, at 1. Although we realize, as the Office of the Attorney General website describes, that a views letter such as this one is not subjected to detailed internal review, does not have the force of law and, therefore, should not be cited for the propositions within it, we nonetheless believe that the Letter is not supported by law and should be withdrawn.

1. The Letter is incompatible with the Kentucky Affordable Housing Act.

After examining the purposes and powers of KHC, the Letter finds that the Kentucky General Assembly established a comprehensive scheme for the regulation of Kentucky's housing policy by KHC, and that this comprehensive scheme preempts regulation of that subject by any other entity. *See* Exhibit A, at 3. Then, extending that line of reasoning without clear support, the Letter asserts that, "[s]ince the administration of project-based rental assistance contracts in multiple Kentucky locations invokes the same need for comprehensive and coherent statewide oversight contemplated by the legislature for the KHC, we believe that the General Assembly would not have intended any other entity to fulfill this function." *Id.* This conclusion conflicts,

however, with the explicit objectives of Kentucky's housing policy articulated by the General Assembly in KHC's enabling statute.

In Section 198A.025 of the Kentucky Revised Statutes, the General Assembly stated that one objective of the Commonwealth's housing policy "shall be to . . . [e]ncourage and strengthen collaborative planning and partnerships among social service providers, all levels of government, and the public and private sectors including for-profit and nonprofit organizations, in the production of affordable housing." *Id.* Nothing in this, or any other articulated objective, indicates that the General Assembly sought to bar any entity from increasing or managing the supply of affordable housing in Kentucky. In fact, the plain language of the statute mandates just the opposite conclusion: the General Assembly wanted to support the creation of partnerships and collaboration among HUD and other entities, whether governmental or not, that would result in more and better affordable housing in the Commonwealth.

This conclusion is bolstered by Section 198A.040(10) of the Kentucky Revised Statutes, which states that KHC has the power:

> [T]o enter into agreements or other transactions with any federal, state, or local governmental agency for the purpose of providing adequate living quarters for [lower- and moderate-income] persons and families in cities and counties where a need has been found for such housing.

Id. Moreover, the statute goes even further, stating that KHC's authority to enter into agreements and other transactions applies only "where no local housing authorities **or other organizations** exist to fill [the need for affordable housing]." *Id.* (emphasis added). This express limitation on KHC's authority to enter into agreements and other transactions in areas already served by local housing authorities or other organizations further undercuts the argument that Chapter 198A in any way operates to reduce the number of entities producing, providing, or administering affordable housing in Kentucky.

2. The Letter is incompatible with the enabling statutes for local housing authorities.

Kentucky law establishes or authorizes the establishment of city, city-county, county and regional housing authorities. *See* KY. REV. STAT. ANN. §§ 80.020, 80.262, 80.320 (collectively, the "Enabling Statutes"). The Enabling Statutes provide housing authorities with the legal authority to "provid[e] adequate and sanitary living quarters for individuals or families . . . with low or moderate income." KY. REV. STAT. ANN. § 80.020. While the Letter finds that the "comprehensive scheme" established by Chapter 198A preempts regulation and administration of affordable housing by any entity other than KHC, this finding is contradicted by the Enabling Statutes.

As noted in the Letter, KHC is charged by Chapter 198A with overseeing the development and implementation of Kentucky's statewide housing policy. However, no

language exists in Chapter 198A that explicitly or implicitly grants to KHC the exclusive authority to oversee the production, provision, and administration of affordable housing in the Commonwealth. Indeed, such a grant of authority would run counter to the Enabling Statutes and would prohibit city, city-county, county and regional housing authorities from performing their statutorily-defined functions without first receiving approval from KHC that their activities fit within the "comprehensive statewide housing policy."

Ultimately, the overriding objective of Kentucky's housing policy is to "encourage the availability of decent and affordable housing for all Kentucky residents." KY. REV. STAT. ANN. § 198A.025. Given the broad nature of this policy goal and the express authorizations for local housing authorities contained within the Enabling Statutes, the Letter's assertion that KHC is charged with overseeing the statewide production, provision, and administration of affordable housing is surprising. Moreover, this conclusion is in direct conflict with the plain language of Chapters 80 and 198A and would serve to limit the availability of decent and affordable housing in the Commonwealth.

3. The Letter is incompatible with previous Opinions of the Attorney General.

The Letter states that KHC is the "only agency with authority under Kentucky law to administer project-based Section 8 rental assistance contracts with [HUD] in Kentucky." Exhibit A, at 1. However, in both 1975 and 1979 the Attorney General issued Opinions concluding that county and city housing authorities are authorized to administer Section 8 funds distributed by the federal government. *See* OAG 79-297, 75-410. For example, the most recent of the Opinions stated that because the "governmental units . . . will merely be furnishing technical assistance . . . and will [only] constitute a conduit for the flow and distribution of rental assistance money from HUD to the owners of the rental dwellings," such activity was permissible under Kentucky law. OAG 79-297, at 3.

The Letter fails to acknowledge the existence of these Opinions, much less distinguish the conclusions reached in them, when it simply states that "this office is aware of no entity, public or private, other than KHC, which has been given statutory authority to conduct such an activity as administering project-based rental assistance contracts for a federal agency in the Commonwealth of Kentucky." Exhibit A, at 3. Simply put, not only does this statement conflict with the clear language of Chapters 80 and 198A of the Kentucky Revised Statutes, but it also conflicts with earlier Opinions of this very Office.

4. The Letter fails to consider the United States Housing Act of 1937's potential impact on these issues.

The Letter also fails to address the possible applicability and impact of federal law, including the United States Housing Act of 1937, on the underlying issues being considered. The applicability of federal law is an important consideration when examining the contractual relationships of a federal agency such as HUD.

5. The Attorney General's issuance of the Letter is problematic.

Pursuant to Kentucky law, the Attorney General is charged with participating in the governance of KHC as an *ex officio* member of its board of directors. *See* KY. REV. STAT. ANN. § 198A.030(3). Thus, respectfully, the Attorney General's Office should not issue interpretations of the law that relate to KHC. The Attorney General undoubtedly would want to avoid what could appear to be a possible conflict of interest.

For all of the reasons stated above, we respectfully request that the Office of the Attorney General withdraw the Letter. I will contact you next week to follow up on this request, and am available to meet in person if that would be helpful.

We very much appreciate your attention to these matters.

Very truly yours,

Cory J. Skolnick

Enclosure

cc: Jack Conway, Attorney General

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EXHIBIT A

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

JACK CONWAY
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

October 13, 2011

Karen Quinn, Esq.
Deputy General Counsel
Kentucky Housing Corporation
1231 Louisville Road
Frankfort, Kentucky 40601-6191

Re: Project-based Section 8 rental assistance contracts

Dear Ms. Quinn:

Although this letter is not a formal opinion of this office, we hope the views expressed will be of some assistance. You have asked whether the Kentucky Housing Corporation (KHC) is the only agency with authority under Kentucky law to administer project-based Section 8 rental assistance contracts with the United States Department of Housing and Urban Development (HUD) in Kentucky. We believe that it is.

The project-based Section 8 rental assistance program, created by the Housing and Community Development Act of 1974, enables HUD or its contract administrator to enter into contracts with property owners to subsidize housing units in specific apartment complexes for those in financial need. The KHC has served as contract administrator for Kentucky since September 1, 2000, overseeing over 22,799 units in 379 properties statewide.[1] The property owners must establish appropriate tenant selection policies for the units, based on area median income, and take applications for rental assistance. The contract administrator must ensure that all parties adhere to the requirements of the program. The KHC, in its capacity as contract administrator, conducts annual on-site visits to

[1] http://www.kyhousing.org/full.aspx?id=3930, retrieved October 13, 2011.

the properties, performs monthly desk reviews, adjusts rents and reviews utility allowances, and provides advice and assistance to tenants and property owners.[2]

The KHC is charged by KRS 198A.035(1) with overseeing the development and implementation of Kentucky's statewide housing policy. The state housing policy is mandated by KRS 198A.025 in order to "[e]ncourage the availability of decent and affordable housing for all Kentucky residents," to "[i]dentify the basic housing needs of all Kentuckians," to "[c]oordinate housing activities and services among state departments and agencies," to "[e]ncourage and strengthen collaborative planning and partnerships among social service providers, all levels of government, and the public and private sectors, including for-profit and nonprofit organization, in the production of affordable housing," to "[c]oordinate housing into comprehensive community and economic development strategies at the state and local levels," and to "[d]iscourage housing policies or strategies which concentrate affordable housing in limited sections of metropolitan areas and county jurisdiction."

In fulfilling its statutory purposes, the KHC has the power "to enter into agreements or other transactions with any federal, state, or local governmental agency for the purpose of providing adequate living quarters for [lower- and moderate-income] persons and families in cities and counties where a need has been found for such housing and where no local housing authorities or other organizations exist to fill such need." KRS 198A.040(10). It also has the power "[t]o provide technical and advisory services to sponsors of residential housing and to residents and potential residents thereof," "[t]o promote research and development in scientific methods of constructing low cost residential housing of high durability," and "[t]o encourage community organizations to participate in residential housing development." KRS 198A.040(13)-(15). Furthermore, KRS 198A.040(16) gives the KHC the power "[t]o make, execute, and effectuate any and all agreements or other documents with any governmental agency or any person, corporation, association, partnership, or other organization or entity, necessary to accomplish the purposes of this chapter." As mentioned above, the purposes of Chapter 198A include requiring the KHC to implement the comprehensive statewide housing policy.

[2] http://www.kyhousing.org/page.aspx?id=657, retrieved October 11, 2011.

Where a comprehensive scheme established by statute places the regulation of a subject under the jurisdiction of a particular agency, regulation of that subject by other entities is preempted. OAG 11-003. The KHC's duty to develop and implement a comprehensive state housing policy presupposes the ability to assess financial conditions and coordinate housing assistance throughout the Commonwealth. Since the administration of project-based rental assistance contracts in multiple Kentucky locations invokes the same need for comprehensive and coherent statewide oversight contemplated by the legislature for the KHC, we believe that the General Assembly would not have intended for any other entity to fulfill this function.

As a matter of state law, therefore, this office is aware of no entity, public or private, other than the KHC, which has been given statutory authority to conduct such an activity as administering project-based rental assistance contracts for a federal agency in the Commonwealth of Kentucky. If you have any questions, you may call this office at (502) 696-5622.

Yours very truly,

JACK CONWAY
ATTORNEY GENERAL

James M. Herrick
Assistant Attorney General

#350

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Bid Protest

CMS CONTRACT MANAGEMENT SERVICES, et al.	)	Case Nos. 12-852-C
	)	12-853C
	)	12-862C
	)	12-864C
Plaintiffs.	)	12-869C
	)	
v.	)	Judge Thomas C. Wheeler
	)	
THE UNITED STATES,	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS AHSC, NTHDC AND CAHI'S MOTION TO AMEND THE ADMINISTRATIVE RECORD

Neil H. O'Donnell
Dennis J. Callahan
Jeffery M. Chiow

ROGERS JOSEPH O'DONNELL
311 California Street, 10th Floor
San Francisco, CA 94104
Tele: 415-956-2828
Fax: 415-956-6457
Email: nodonnell@rjo.com

Attorneys for AHSC, NTHDC and CAHI

February 8, 2013

GAO
Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: National Housing Compliance; Assisted Housing Services Corporation; Chicago Housing Consulting Services, Inc.; Maryland Department of Housing and Community Development; Affordable Housing Innovators, Inc.; New York State Housing Trust Fund Corporation; Massachusetts Housing Finance Agency; Rhode Island Housing and Mortgage Finance Corporation; Arizona Department of Housing; Delaware State Housing Authority; New Jersey Housing and Mortgage Finance Agency; Oregon Housing and Community Services Department; North Tampa Housing Development Corporation, Inc.; California Affordable Housing Initiatives Inc.; California Housing Finance Agency; Kansas Housing Resource Corporation; Michigan State Housing Development Authority; Comprehensive Contract Services, Inc.; Southwest Housing Compliance Corporation; New Mexico Mortgage Finance Authority; Louisiana Housing Finance Agency; CMS-Contract Management Services; Connecticut Housing Finance Authority

File: B-405312; B-405312.2; B-405312.3; B-405312.4; B-405328; B-405328.2; B-405328.3; B-405329; B-405329.2; B-405330; B-405330.2; B-405330.3; B-405330.4; B-405331; B-405331.2; B-405331.3; B-405332; B-405332.2; B-405333; B-405333.2; B-405333.3; B-405333.4; B-405333.5; B-405334; B-405334.2; B-405335; B-405335.2; B-405336; B-405336.2; B-405336.3; B-405337; B-405337.2; B-405338; B-405338.2; B-405339; B-405339.2; B-405340; B-405340.2; B-405341; B-405341.2; B-405341.3; B-405342; B-405343; B-405343.2; B-405344; B-405345; B-405345.2; B-405345.3; B-405375; B-405375.2; B-405383; B-405387; B-405397; B-405418; B-405419; B-405421; B-405432; B-405436; B-405436.2; B-405453; B-405454; B-405465.2; B-405482; B-405483; B-405485; B-405486

Date: August 11, 2011

DECISION

National Housing Compliance, Assisted Housing Services Corporation, Chicago Housing Consulting Services, Inc., Maryland Department of Housing and Community Development, Affordable Housing Innovators, Inc., New York State Housing Trust Fund Corporation, Massachusetts Housing Finance Agency, Rhode Island Housing and Mortgage Finance Corporation, Arizona Department of Housing, Delaware State

Project-Based Rental Assistance

First term renewal costs of contracts expiring in 2012 through 2017:

Original Term Expiring Contracts Grouped By Year of Expiration, Arrayed through FY 2017
Reflects Estimated Annual Renewal Need Funding (12 months) For Each Year

FISCAL YEAR of EXPIRATION	CONTRACTS	UNITS	FY 2012 Renewals	FY 2013 Renewals	FY 2014 Renewals	FY 2015 Renewals	FY 2016 Renewals	FY 2017 Renewals
2012	478	24,393	$222,203,080	$226,955,493	$231,804,920	$236,654,371	$241,617,661	$246,677,799
2013	328	18,365	$0	$198,227,110	$202,467,107	$206,707,088	$211,037,510	$215,461,880
2014	116	8,139	$0	$0	$89,628,532	$91,505,946	$93,422,499	$95,381,549
2015	85	3,789	$0	$0	$0	$40,162,781	$41,002,818	$41,863,751
2016	40	4,424	$0	$0	$0	$0	$50,243,696	$51,294,547
2017	107	8,262	$0	$0	$0	$0	$0	$65,027,294
	1,154	67,372	222,203,080	425,182,603	523,900,559	575,030,186	637,324,184	715,706,820

Assumptions for Annual Inflation: OCAF is 1.8 percent for fiscal year 2012 and all years beyond.

BID PROTEST

No. 12-852C (Consolidated)
(Honorable Thomas C. Wheeler)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CMS CONTRACT MANAGEMENT SERVICES, et. al.,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
Defendant.

PLAINTIFFS CMS CONTRACT MANAGEMENT SERVICES' AND THE HOUSING AUTHORITY OF THE CITY OF BREMERTON'S REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR JUDGMENT UPON THE ADMINISTRATIVE RECORD (INCLUDING RESPONSES TO BRIEFS FILED BY INTERVENOR AND *AMICUS CURIAE*)

COLM P. NELSON, WSBA #36735
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
(206) 447-4400
Attorney of Record for Plaintiffs CMS Contract Management Services and The Housing Authority of the City of Bremerton

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BID PROTEST

CMS CONTRACT MGMT. SVCS., ET AL., **Plaintiff,** **v.** **THE UNITED STATES,** **Defendant.**	**Case Nos. 12-852C, 12-853C, 12-862C, 12-864C, and 12-869C** **Judge Wheeler**

CORRECTED PLAINTIFF SOUTHWEST HOUSING COMPLIANCE CORPORATION'S: (1) REPLY IN SUPPORT OF ITS CROSS-MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD; (2) OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, AND IN THE ALTERNATIVE, MOTION FOR JUDGMENT UPON THE ADMINISTRATIVE RECORD; AND (3) RESPONSE TO THE BRIEFS FILED BY INTERVENOR MASSHOUSING AND *AMICUS CURIAE* NATIONAL COUNCIL OF STATE HOUSING AGENCIES

Plaintiff Southwest Housing Compliance Corporation ("SHCC"), through undersigned counsel, hereby submits this reply in support of its cross-motion for judgment on the administrative record, and response to the briefs filed by the United States, the Intervenor Massachusetts Housing Finance Agency ("MassHousing") and *Amicus Curiae* National Council of State Housing Agencies ("NCSHA") on January 30, 2013.

Richard J. Vacura
MORRISON & FOERSTER LLP
1650 Tysons Blvd., Suite 400
McLean, VA 22102
(703) 760-7764
(703) 760-7349 (fax)
Counsel of Record for Plaintiff Southwest Housing Compliance Corporation

Of Counsel:
Tina D. Reynolds
K. Alyse Latour
MORRISON & FOERSTER LLP
Dated: February 13, 2013

assistance agreement." *Id.* Ultimately, the Court found that "OSHA was using the agreements to obtain the services of third parties," and therefore held that "OSHA was conducting a 'procurement' under the terminology of the Tucker Act." *Id.* at 585.

In this case, HUD is issuing the ACCs to the PHAs pursuant to the statutory mandate in Section 8(b)(1), similar to the situation *360Training.com*. Section 8(b)(1) gives HUD the flexibility to determine how to structure the ACC.[6] Section 8(b)(1) ("The Secretary is authorized to enter into annual contributions contracts with public housing agencies..."). Therefore even if one accepts that the NOFA is a cooperative agreement, HUD's issuance of the NOFA is a "procurement process" within the meaning of the Tucker Act, and this Court has the authority to consider the propriety of the NOFA as a cooperative agreement as well.

B. The Out-of-State Restrictions In The NOFA Are Arbitrary And Capricious.

The out-of-state restrictions contained in the NOFA fly in the face of the competition requirements in CICA and the FGCAA. In assessing whether or not an agency decision withstands scrutiny under the Tucker Act, the applicable standard of review is whether or not the agency's actions were "arbitrary and capricious." *First Enterprise v. United States*, 61 Fed.Cl. 109, 112 (2004) (in a Tucker Act case, "[t]he standard of review is whether the procuring agency's conduct was arbitrary and capricious") (citing 28 U.S.C. §1491(b)(4) (2003)). The Supreme Court has described an arbitrary and capricious review as follows:

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[6] If HUD has a "statutory directive," it is merely to "enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payment to owners of existing dwelling units..." 42 U.S.C. §1437f(b)(1). Section 8(b)(1) does not direct HUD to enter into a "grant" or "cooperative agreement" or even a "procurement contract." The definition of an "annual contributions contract" similarly provides little guidance. An ACC is defined as "the written contract between HUD and a PHA under which HUD agrees to provide funding for a program under the 1937 Act, and the PHA agrees to comply with HUD requirements for the program." 24 C.F.R. § 5.403.

> The reviewing court must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.' *Citizens to Preserve Overton Park v. Volpe*, *supra*, 401 U.S. at 416, 91 S.Ct. at 824. The agency must articulate a 'rational connection between the facts found and the choice made.' *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 246, 9 L.Ed.2d 207 (1962). While we may not supply a reasoned basis for the agency's action that the agency itself has not given, *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995 (1947), we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned. *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 595, 65 S.Ct. 829, 836, 89 L.Ed. 1206 (1945).

Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285-86 (1974); *see also Advanced Data Concepts, Inc. v. United States,* 216 F.3d 1054, 1057-58 (Fed. Cir. 2000) ("The arbitrary and capricious standard applicable here is highly deferential. This standard requires a reviewing court to sustain an agency action ***evincing rational reasoning and consideration of relevant factors***.") (emphasis added).

Here, the Government states that "HUD's policy regarding crossing state lines as set forth in the 2012 NOFA is reasonable: ***To avoid programmatic disruptions***, HUD decided to consider out-of-State applicants only for States for which there was no qualified in-State applicant." Govt. Reply Brief at 29 (citing AR 1261) (emphasis added). But the single page of the NOFA that the Government cites says nothing about a rationale for excluding out-of-State applicants and certainly makes no mention of the goal of "avoid[ing] programmatic disruptions." *See* AR 1261. In fact, the rationale behind the restrictions appears ***nowhere*** in the administrative record. Rather, it is only the government's lawyers' after-the-fact rationalization of purpose that appears in the government's briefs.

As the record is devoid of ***any basis*** for the agency's decision to impose restrictions on out-of-state PHAs, the decision is arbitrary and capricious on its face. The government cannot concoct a post-hoc rationale that has no basis in the administrative record whatsoever. *See Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency action. . . an agency's discretionary order [can] be upheld, if at all, on the same basis articulated in the order by the agency itself. . . . For the courts to substitute their or counsel's discretion for that of the [agency] is incompatible with the orderly functioning of the process of judicial review."). There is simply no evidence here as to what consideration the agency gave to the out-of-state restrictions it has imposed. In the absence of such evidence, it is not possible for the Court to discern whether or not the agency's actions were rational.

The Supreme Court faced a similar situation in *Motor Vehicle Manufacturers Assoc. of the United States v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983). That case concerned the decision by the National Highway Traffic Safety Administration to rescind a prior requirement for passive restraints in automobiles. In finding that the decision to rescind was arbitrary and capricious, the Court pointed to the agency's failure to consider alternative possibilities, and its failure to give adequate reasons for its abandonment of the prior proposed rule. *Id.* at 47-48. As the Court stated: "There are no findings and no analysis here to justify the choice made, no indication of the basis on which the [agency] exercised its expert discretion," *id.* at 48 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962)), and "[w]e have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner," *id.* Here, HUD offered no contemporaneous explanation to justify the imposition of out-of-state restrictions in the NOFA. There is no indication that HUD

considered any alternate possibilities, or that it undertook any reasoned analysis to come to its ultimate position. Under these circumstances, the decision by HUD to include the out-of-state restrictions in the NOFA was arbitrary and capricious.

Further, even the government's post-hoc explanation of the purpose of the out-of-state restrictions is less than credible. The Government claims that HUD imposed restrictions on out-of-State applicants as a means of avoiding litigation. Govt. Reply Brief at 29, 32. However, as these protests make clear, inclusion of these restrictions in the NOFA is just as likely to invite litigation as to discourage it. Thus, even if this Court were to believe that the basis for HUD's imposition of restrictions was the attempt to avoid possible litigation, this explanation lacks any credible basis.

Finally, it is noteworthy that the National Council of State Housing Agencies suggests a different reason for inclusion of the out-of-state restrictions in the NOFA, one that focuses on the PHAs as creatures of state law and on state law as determinative of which PHAs may operate in each state. NCSHA Brief at 13-18. Notably, the government *does not* claim that consideration of and deference to state law motivated HUD's decision. Govt. Reply Brief at 32 ("HUD is not trying to judge whose analysis of any particular state's law is superior; HUD simply is trying to avoid the programmatic delays that result when there is a conflict on the question."). Deference to state law thus cannot be deemed a credible rationale for HUD's actions given not only that there is no evidence in the record to support such a finding, but also the government's outright denial that such deference motivated HUD's decision.

In sum, HUD offered no explanation for its decision to include out-of-state restrictions in the NOFA and this decision is therefore arbitrary and capricious. This Court should direct HUD to remove the restrictions from the NOFA.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
(BID PROTEST)

CMS CONTRACT MANAGEMENT SERVICES, *et al*,	)	No. 12-852C (and consolidated cases)
Plaintiffs,	)	
v.	)	
THE UNITED STATES,	)	Judge Thomas C. Wheeler
Defendant.	)	

PLAINTIFF NATIONAL HOUSING COMPLIANCE'S CORRECTED REPLY IN SUPPORT OF ITS CROSS-MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD; REPLY IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, AND IN THE ALTERNATIVE, MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD; REPLY TO INTERVENOR'S AND AMICUS CURIAE'S REPLIES IN SUPPORT OF DEFENDANT'S MOTIONS; AND RESPONSE TO INTERVENOR'S MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD WITH RESPECT TO THE RESTRICTIVENESS ISSUE

Respectfully submitted,

/s/ Michael R. Golden
Michael R. Golden
PEPPER HAMILTON LLP
600 14th Street, N.W., Suite 500
Washington, DC 20005-2004
Telephone: (202) 220-1244
Direct facsimile: (800) 616-5742
E-mail: goldenm@pepperlaw.com
Counsel of Record for Plaintiff, National Housing Compliance

Of counsel:
Michael A. Hordell
Heather Kilgore Weiner
Samuel W. Jack
PEPPER HAMILTON LLP

Dated: February 8, 2013
Corrected Version Dated: February 13, 2013

C. HUD's NOFA Will Result in the Award of Unjustified Sole Source Contracts

As an initial matter, HUD concedes that it did not issue the NOFA in accordance with CICA or the FAR, AR1167, and admits that "there were not lengthy deliberations on [the in-state restriction issue]," which explains why there "are few responsive documents" on this issue in the administrative record. AR1151. In light of these admissions, HUD cannot claim that it analyzed whether its sole source restrictions could be justified under the federal procurement rules at the time it issued the NOFA. Indeed, the Administrative Record does not support the Government's rationale, which is *post hoc* and should not be afforded deference by the Court.[11]

First, in support of the 2012 NOFA's in-state restriction, the Government asserts that HUD has a long-standing policy of deferring to state law, but provides no authority for this assertion. *See* Gov't Reply, pp. 29-31. As the NOFA states, nothing in the 1937 Housing Act prohibits an instrumentality from acting as a PHA in a foreign state. AR554. In fact, the plaintiff PBCAs have been performing these services in foreign states successfully since 1999. Instead, the Government contends that the Housing Act's definition of PHA establishes that the authority of a PHA performing PBCA contract administration services is a matter of state law. Gov't Reply, p. 30. Considering that the broad definition of PHA in the Housing Act, 42 U.S.C. § 1437a(3)(b)(6)(A), to include "instrumentality," there is nothing that supports the Government's new restrictive interpretation. The instrumentality language permits entities other than in-state PHAs to qualify as PHAs under this definition. Accordingly, HUD's new restrictions on PBCA-eligibility were not intended by Congress, and the Government's

[11] If the Court concludes that this is a procurement for services, it should require HUD to go back and reissue this acquisition in accordance with CICA and the FAR, and to justify any restrictions on competition, if any, pursuant to those guidelines. Alternatively, even if the Court concludes that the use of a cooperative agreement was appropriate here, the record does not establish that HUD adhered to the requirement to promote competition imposed by the FGCAA. 31 U.S.C. § 6303(3); *360Training.com Inc. v. United States*, 104 Fed Cl. 575, 579 (2012).

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
(BID PROTEST)

CMS CONTRACT MANAGEMENT, et al. Plaintiffs, v. THE UNITED STATES, Defendant, and MASSACHUSETTS HOUSING FNANCE AGENCY, Intervenor.	Nos. 12-852, 853, 862, 864, 869 Judge Thomas C. Wheeler

PLAINTIFF, JEFFERSON COUNTY ASSISTED HOUSING CORPORATION'S, CORRECTED RESPONSE TO BRIEFS OF INTERVENOR AND AMICUS CURIAE AND REPLY TO DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' CROSS-MOTIONS FOR JUDGMENT UPON THE ADMINISTRATIVE RECORD

Respectfully submitted,

Robert K. Tompkins
Elizabeth M. Gill
Trevor Tullius
Patton Boggs LLP
2550 M Street, NW
Washington, DC 20037
(202) 457-6168
(202) 457-6315 (facsimile)

misguided point it does not need specific statutory authority to enter a procurement contract, but it does need money. DOJ Reply, at 26.

D. HUD's Flawed Syllogism Demonstrates that it also lacks even the authority to enter into cooperative agreements here.

DOJ invokes the same "purpose" language of the 1937 Act and the same broken syllogism to support its supposed lack of authority to enter into the HAP contracts in the first instance. In doing so, HUD suggests that Congress has implicitly compelled HUD to enter into cooperative agreements. For the same reasons set out above, HUD's arguments also fail to create statutory authority for it to enter a cooperative agreement.

II. THE NOFA IS FATALLY FLAWED.

As discussed below, through the NOFA HUD is re-branding the PBCAs as cooperative agreements them with new eligibility restrictions because it wants to establish sole source contracts with a favored class of PHAs: the in-State HFAs. HUD's shift in policy has nothing to do with concerns about state Attorneys General ("AG") letters or HFA's having some special ability to perform the work required (they don't).[8] Notwithstanding NCHSA's amicus brief , many HFA's (NCHSA's members) argued in the 2011 GAO protests that the PBCA contracts <u>are</u> procurement contracts. As a credit to its consistency, one of those HFA's, Mass Housing, maintains that position before this Court. There is not a genuine belief anywhere in the PHA community that the PBCA contracts are anything but procurement contracts.

[8] In fact, as with the past PBCA contracts the 2012 NOFA expressly allows PBCAs to subcontract out 100% of the work to anyone, PHA or not, showing that there's nothing inherently governmental about the work and that HUD does not really care whether an HFA actually performs it. AR 1042, Q&A 124.

In a 2009 Report HUD's OIG found significant waste and abuse in the PBCA program. AR 459-495.[9] In response HUD pledged to re-compete the PBCA contracts through a process that (1) was market driven as evidenced by recent competitions; (2) would increase the potential number of applicants; and (3) would encourage PBCAs to operate in various geographical areas to provide efficiencies and economies of scale. AR 490. In February 2011, HUD announced a new competition for each of the 53 jurisdictions. AR 522. The results of a fair and open competitive process were as one would expect and HUD trumpeted the fact that its effective use of competition would save taxpayers $100 million a year. *See* Ex. 2.

However, as noted in JeffCo's 2012 GAO protest:

> This basic act of fiscal sanity was anathema to these protesters, many of which were in-state, statewide HFAs. Leading up to 2011, HFA's held 35 of the 53 PBCA contracts. The 2011 award decisions would have resulted in 28 PBCA contracts changing hands. 26 contracts were awarded to out- of-state PHAs. As a result of competition HFAs lost in 16 of the 35 states they held. In the 19 states HFAs won, nine (9) were in states where the HF A was the sole bidder. Put another way, when HFAs faced competition they were successful in only ten (10) out of 42 states.

AR 412. Simply put, the bloated and inefficient HFAs could not compete with other PHAs whose focus was on providing efficient, effective service to HUD. Ultimately, disappointed bidders filed protests at GAO for every jurisdiction in which HUD received more than one offer (42 of 53). Many of the protesters were in-state HFAs. Among other things the protestors argued that HUD

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[9] Among other things, the OIG recognized that "[c]urrently, for most of the larger PBCAs, HUD monitors the PBCAs that monitor their subcontractors that monitor their lower tier subcontractors. There is also profit built into each layer." AR 476. The OIG also noted that HUD had failed to re-compete the PBCA contracts and that most if not all of them were operating on extensions of the initial terms. AR 468, 478. The OIG stated that in one case a PBCA had re-competed its subcontract resulting in savings of as much as $5.8 million a year but had failed to pass that savings along to HUD, instead opting to pocket it. AR 468. In summary, the OIG found that HUD was overpaying the PBCA contractors and wasting tens of millions of dollars a year. The OIG found that the excess funds being paid were being used by states for all manner of things, often completely unrelated to the cost of performing the PBCA contract. AR 470.

erred by giving any consideration to price. They all argued that the PBCA contract was a procurement contract. HUD cancelled the 2011 awards which mooted the protests and also continued in place the existing PBCA contracts, and as of now, HFA's are still performing 37 PBCA contracts. With the prospect of losing millions of dollars in excess payments the HFA's re-doubled their efforts to make sure they never had to face competition again.

In this final round of briefing HUD and its allies have now belatedly attempted to re-introduce the issue of the Sole Source Restriction. As JeffCo has repeatedly noted, there is no documentation from HUD in the Administrative Record on the issue of the Sole Source Restriction. JeffCo renews its objections and concerns, and notes in particular that HUD has steadfastly refused to provide any contemporaneous documents on the issue and therefore the Administrative Record may be inadequate to make any finding other than that the NOFA lacks a rational basis and is arbitrary and capricious. In addition to violating relevant procurement laws, the NOFA's elimination of competition also violates the Administrative Procedure Act and other laws as summarized below.

A. HUD Admits that the Terms of the NOFA Violate Federal Procurement Laws.

HUD concedes that if the NOFA is a procurement contract then the NOFA anti-competitive provisions (hereafter the "Sole Source Restriction")[10] likely violated the competition requirements and other provisions of the Federal Acquisition Regulation. AR 1151. Given this

[10] HUD included two significant, unprecedented eligibility restrictions in the NOFA, one which bars PHAs from crossing-state-lines and another requiring a PHA to have explicit authority to operate state-wide. First, the NOFA contains a new provision entitled "Crossing States Lines" which has never appeared in any prior competition held by HUD in the PBCA program. AR 82 , NOFA, p. 4. Second, the NOFA excludes local in-state PHAs, such as municipal housing authorities or non-profits they establish, all of which are otherwise considered PHAs by federal law. *Id.* This restriction, when combined with the crossing-state-lines restriction, leaves only a single eligible bidder in most if not all states: the in-state HFA.

admission, if this Court determines the PBCA contracts are procurement contracts then it should sustain the protests.

B. The Terms of the NOFA Are Arbitrary and Capricious and Unreasonable.

Since the inception of the PBCA program in 1999, HUD has allowed and even encouraged offerors to bid for PBCA contracts in multiple states. AR 428. JeffCo is a PHA and HUD has determined JeffCo to be legally qualified to perform as a PBCA in multiple states since 2003 including JeffCo's home state of Alabama as well as Connecticut, Mississippi and Virginia. AR 402. JeffCo has successfully performed PBCA contracts in each of these states and continues to perform them to this day. There has never been a legal challenge to any out-of-state PHA, including JeffCo, over its authority to perform as a PBCA. In fact, as recently as November 2012, HUD extended all of JeffCo's PBCA contracts through 2014, including in Connecticut for which HUD has an AG letter.

Given this extensive, uninterrupted history of PHAs crossing state lines to perform PBCA contracts, HUD's introduction of the Sole Source Restriction in 2012 is particularly baseless. There has been no relevant change in the 1937 Act, no change in the status of JeffCo or similarly situated PHAs, no relevant change to the PBCA itself (*compare* Ex. 1 and Ex. 3) and no formal legal determination that JeffCo or other PHAs are ineligible to continue to compete for and perform these PBCA contracts throughout the country. To the contrary, HUD admits nothing in federal law that precludes PHAs from crossing state lines.[11] AR 82; NOFA, p. 4 ("HUD believes that nothing in the 1937 Act prohibits an instrumentality PHA that is 'authorized to engage in or assist in the development or operation of public housing' within the meaning of Section 3(b)(6)(A) of the 1937

[11] Intervenor's argument that this situation is analogous to state licensing for electricity is inapposite. The statute governing the procurement of electricity states that the government "may not ... purchase electricity in a manner inconsistent with state law." Intervenor's Brief at 4, citing 40 U.S.C. § 591(a). This is not a licensing case and HUD admits that there is no such statutory restriction. AR 82.

Act from acting as a PHA in a foreign State.") By HUD's own admission nothing in federal law allows for the restrictions in the NOFA. However, HUD has persisted with the Sole Source Restriction.

HUD's Sole Source Restriction is also an about-face from past practice and as well as commitments it made to its OIG in 2009: HUD is now eliminating competition, not increasing it; HUD is walking away from the efficiencies and other benefits that it acknowledged can be obtained by allowing PHAs to operate in multiple jurisdictions; and HUD is barring the entities it determined in 2011 to be the most experienced, best qualified and most cost-effective PHAs, including JeffCo *See* p. 11-12, *infra.*

In late 2011, JeffCo became aware that the HFA community was attempting to influence HUD to exclude non-HFAs and that in a few cases HFAs had sought letters from their state AGs– which typically serve as the legal counsel to the HFAs – in support of their anti-competitive agenda. See AR 330-394. JeffCo, through counsel, submitted a letter to HUD expressing its concerns in February 2012. Ex. 4, pp. 1-2. The March 2012 NOFA confirmed that JeffCo's concerns were ignored and in April 2012 JeffCo sent yet another letter to HUD reiterating its concerns about the NOFA process and the unduly restrictive provisions in the NOFA. Ex. 4, p. 3. HUD did not respond to JeffCo and did not consider the issues and concerns JeffCo raised.

Additionally, HUD established a Question and Answer ("Q&A") process as part of the NOFA. HUD committed to answer "all" questions received by April 30, 2012, and stated it would post all answers to the NOFA website by not later than May 31, 2012. *See e.g.* AR 1032, Q & A Question 64. JeffCo submitted several questions in the Q&A process, including several directed at the Sole Source restrictions in the NOFA. AR 1016-1021. HUD again refused to respond to JeffCo's questions on the issue of the Sole Source Restriction. AR 1011 *et seq.* HUD's refusal to respond not only failed to address the substance of JeffCo's concerns, but it violated the terms of

the NOFA and deprived JeffCo of a meaningful understanding of the NOFA restrictions. *Id.* JeffCo's concerns about the Sole Source Restriction and AG letters were also summarized in its GAO protest (AR421-422). HUD has not responded to any of JeffCo's inquiries given the dearth of documents in the administrative record it obviously gave no reasoned consideration to the issues and concerns raised.[12]

1. The APA and this Court's Standard of Review

The Administrative Procedure Act ("APA") declares unlawful agency action which is "(A) arbitrary and capricious, an abuse of discretion or otherwise not in accordance with the law; (B) contrary to constitutional right, power privilege or immunity; (C) in excess of statutory jurisdiction; [or] (D) without observance of procedure required by law...." 5 U.S.C. § 706. When this Court reviews a challenge to agency action that is alleged to be arbitrary or capricious or an abuse of discretion, it is obliged to "determine whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion." *Castle Rose, Inc. v. United States*, 99 Fed. Cl. 517, 524 (2011)(citing *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001)). Reasoned decision making is also a basic requirement of the APA under 5 U.S.C. § 706(A)(2). The APA arbitrary and capricious standard requires that "the final decision reached by an agency be the result of a process which 'consider[s] the relevant factors' and is 'within the bounds of reasoned decision making.'" *Software Testing Sol., Inc. v. United States*, 58 Fed. Cl. 533 (2003) (citing *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983)).

In its Reply, HUD for the first time in these protests, takes a position on this issue, but merely to state that it included the Sole Source Restriction because of a "policy" to avoid

[12] HUD's failure to provide JeffCo with a response and a reasoned statement for the grounds of denial of its inquiry violates Section 555(e) of the APA which states: "Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial."

programmatic disruptions.[13] DOJ Reply, at 32. HUD does not cite to a single contemporaneous document that supports this purported "policy" or the use of the Sole Source Restriction. Moreover, HUD completely ignores the predictable challenges by those opposed to the Sole Source Restriction, such as JeffCo, and that they would disrupt the program as well. HUD's decision to include the Sole Source Restriction is not supported by a coherent or reasonable explanation. It is also clear from the record (or lack thereof) that HUD did not consider all of the relevant factors prior to inclusion of the restriction, and that HUD did not engage in "reasoned decision-making." For each of these reasons and others set out below the NOFA violates the standards of the APA.

One of the many fatal flaws in HUD's *post hoc* explanation is that JeffCo and other similarly situated PHAs have been performing as PBCA for over ten years in multiple states with no argument or interference from any state Attorney General. This includes in states where HUD claims that an AG letter could bar their performance, such as Connecticut. Moreover, many of the AG letters upon which HUD relies do not even address the issue of the authority of out-of-state PHA's to operate in individual states, rather the letters address the scope of the in-state entity's authority, i.e. state-wide versus local.[14] *See* p. 22-23, *supra*; Ex. 4; AR 401 - 424 , JeffCo Protest; *see also* JeffCo, Complaint, Ex. 12, pp. 20-22. Importantly, prior to the issuance of the NOFA and relying on statutory authority for an instrumentality to operate as a PHA, HUD itself challenged the

[13] While the *Amicus* argues that the Sole Source Restrictions are included in deference to determinations of State law (*Amicus* at 13-18), it should be noted that HUD does not assert that the restriction was inserted into the NOFA to appease any preference to state law or any unrelated legislative state preferences. DOJ Reply at 32 ("HUD is not trying to judge whose analysis of any particular state's law is superior ..."). The Court should disregard *Amicus'* argument in its entirety.

[14] HUD's November 19, 2012 memo (AR 1-5) is also a *post hoc*, litigation memorandum. It is also inaccurate and further shows HUD has given no reasoned consideration to the AG letters. Ms. Galante states that 20 AGs have stated that only in-state entities have the authority to perform the functions required by the ACCs under their State's laws. AR 4. In fact, of the letters submitted, some don't address the issue at all and many of them only address the authority of a local, in-state PHA to operate statewide. *See e.g.* Ex 4, AR 421-422.

authority of the Kentucky Attorney General to opine that a sole source PBCA award be directed to the Kentucky Housing Corporation. *See* Docket Entry 62, NHC Motion to Supplement the Administrative Record, Ex. 1. Finally, none of the Attorney General letters make any reference to lawsuits against JeffCo or any other out-of-state PHA. Clearly there is no threat of litigation within those self-serving letters provided at the behest of the HFAs. Again, there has never been a legal challenge to JeffCo's performance or that of any other out-of-state PBCA contractor.

Moreover, the explanation provided in HUD's Reply brief fails to acknowledge that the excluded PHAs such as JeffCo would likely challenge the unlawful restrictions. If the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or the decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise", the court should set aside an agency's decision. *360Training.com, Inc. v. United States*, 106 Fed. Cl. 177, 185 (2012) (citing *Ala. Aircraft Indus., Inc. v. Unites States*, 586 F.3d 1372, 1375 (Fed. Cir. 2009)). In choosing to limit competition, HUD has failed to consider all aspects and ramifications of its decision.

2. HUD's NOFA is Arbitrary and Capricious and in Violation of Law for Other Reasons, too.

First, federal law preempts state law here. HUD admits that there is nothing in Federal law that prohibits PHAs from crossing state lines to serve as PBCA contractors. The Attorney General letters are fundamentally flawed and not binding on their face; however, even if they were binding pronouncements of state law, Federal law would preempt any such state law requirements. *See Univ. of Co. Found. v. American Cyanamid Corp.*, 342. F.3d 1298, 1305 (Fed. Cir. 2003) ("[W]hen compliance with both state and federal law is impossible, the conflicting state law is preempted.

Second, there is no support in the Administrative Record for the Sole Source Restriction and it therefore fails the reasoned decision making test. This Court is required to make a searching analysis of HUD's final agency action, but any such analysis is impossible given the total void of

information in the record regarding the purpose or justification for the in-state preference included in the NOFA.

Third, HUD cannot cure its failure to explain itself with *post hoc* rationalizations. *See CRAssociates, Inc. v. United States*, 95 Fed. Cl. 357, 376 (2010) ("Any *post hoc* rationales an agency provides for its decision are not to be considered.") (internal citation and quotations omitted). The Court will only review HUD's deliberations contemporaneous with its decision to discriminate against out-of-state public housing agencies. "This approach serves to [reinforce] the agency's obligation to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal citation and quotations omitted). HUD cannot complete this duty after it makes a decision. *See, e.g., 210 Earll, L.L.C. v. United States,* 77 Fed. Cl. 710, 721 (2006) ("The APA requires a reasoned analysis at the time of the decision.").

Because HUD failed to provide a rational explanation for the Sole Source Restriction, any reason or justification provided by HUD's counsel in response to this protest action—even if supported by the administrative record—is inadequate to correct the agency's violation of the APA. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."); *Parker v. Office of Personnel Management*, 974 F.2d 164, 166 (Fed. Cir. 1992) ("*[P]ost hoc* rationalizations will not create a statutory interpretation deserving of deference.").

Fourth, the Sole Source Restriction reflects a complete reversal in HUD's approach to selecting PBCA contractors. HUD has a particular obligation to explain its departure from a "settled course of behavior." *See Motor Vehicles Mfrs.*, 463 U.S. at 41-42. One of the core tenets of reasoned decisionmaking is that 'an agency changing its course ... is obligated to supply a reasoned

analysis for the change.' *Id.* at 42. HUD has utterly failed in its obligation to provide a reasoned analysis for its changed approach in PBCA selection.

Finally, the NOFA violates the Federal Grant and Cooperative Agreement Act which directs agencies to "maximize competition." 31 U.S.C. §6301. The Sole Source Restriction reduces the applicant pool, drives up costs and diminishes competition for PBCA Contract awards.

CONCLUSION

For the reasons stated, Plaintiff JeffCo requests that this Court sustain its Cross-Motion for Judgment on the Administrative Record and Deny the Defendant's Motion to Dismiss and Motion for Judgment on the Administrative Record.

February 13, 2013

Respectfully submitted,

/S/Robert K. Tompkins
Robert K. Tompkins
PATTON BOGGS, LLP
2550 M Street, NW
Washington, D.C. 20037
Telephone: (202) 457-6000
Facsimile: (202) 457-6315
Counsel for Plaintiff The Jefferson County Assisted Housing Corporation

PBCA's," it is HUD staff that is identified as performing such functions as: "process contract renewal requests," "determine project rent levels," "conduct management and occupancy reviews," "negotiate management improvement plans," and "initiate necessary enforcement actions." *Id.* In contrast, HUD describes the PBCAs' duties in barely 1½ lines. AR 1523. HUD then notes that the "contracts" for PBCA services promote "the Department's efforts to be more effective and efficient in the oversight and monitoring of [the project-based] program," the very reason the contemporaneous records shows HUD undertook the PBCA initiative in 1999. *Id.*

Further, in the 14-page document HUD mentions "Public Housing Authorities" and "state housing finance agencies" exactly once, explaining that they are "typically" the PBCAs. AR 1523 The only mention of "PHAs" in general comes in describing a verification system HUD imposes on them "to reduce fraud, waste and abuse." AR 1530-31. None of this description is consistent with HUD's litigation position that, at Congress' direction, it has turned responsibility for these project-based programs over to the PHAs.

II. THE NOFA'S RESTRICTIONS ON COMPETITION ARE ILLEGAL

The Competition in Contracting Act (CICA) applies to all procurement contracts and mandates that the Government obtain full and open competition. 41 U.S.C. §3301(a)(2012). HUD maintains that the NOFA solicits cooperative agreements rather than procurement contracts and admits that, as a result, it did not follow the requirements of "CICA" and the FAR. AR 1151.[23] Even if this Court agreed that HUD is soliciting cooperative agreements, it still has

[23] Although *Amicus* NCHSA supports HUD's position, 13 of its members, all state HFAs, filed protests at GAO in connection with the 2011 Invitation. Given the limits of GAO's jurisdiction, they thus effectively conceded that the PB ACCS are procurement contracts. *See* Exh. 2 to AHSC's Motion to Amend the AR (GAO's Decision Dismissing Protests, Aug 11, 2011).

jurisdiction to evaluate the NOFA's restrictive provisions under the Administrative Procedure Act review standard. *See 360Training.com*, 104 Fed.Cl. at 579; 28 U.S.C. §1491(b)(4).

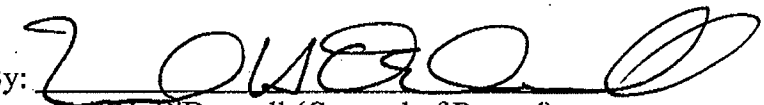
Congress intends for HUD to promote competition in awarding cooperative agreements (FGCAA, 31 U.S.C. §6301(3)) and to reward PHAs "that perform well" while providing for "accountability" (QWHRA, §1437). Under the NOFA's restrictions, in many states the pool of eligible awardees will be one. Thus, absent some support in the record, the restrictions defy congressional intent and are unreasonable. Here, HUD refused to produce any documents at GAO to justify the NOFA's restrictive provisions. AR 1151.

* * * * *

It is neither required nor appropriate that HUD solicit PBCA services under a NOFA that does not comply with CICA and contains unjustified restrictions on competition. AHSC, NTHDC and CAHI respectfully renew their request that this Court grant their motion for judgment on the administrative record and order appropriate relief, including recovery of the costs that they incurred in preparing responses to the NOFA.

Dated: February 13, 2013

Respectfully submitted,

By: 

Neil H. O'Donnell (Counsel of Record)
Dennis J. Callahan
Jeffery M. Chiow

ROGERS JOSEPH O'DONNELL
311 California Street, 10th Floor
San Francisco, CA 94104
Tel: 415-956-2828
Fax: 415-956-6457
Email: nodonnell@rjo.com

Attorneys for Defendants AHSC, NTHDC and CAHI

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Bid Protest

CMS CONTRACT MANAGEMENT SERVICES, et al.	)	Case Nos. 12-852C
	)	12-853C
	)	12-862C
	)	12-864C
Plaintiffs.	)	12-869C
	)	
v.	)	Judge Thomas C. Wheeler
	)	
THE UNITED STATES,	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS AHSC, NTHDC AND CAHI'S SUPPLEMENTAL BRIEF

ROGERS JOSEPH O'DONNELL

Neil H. O'Donnell (Counsel of Record)
Dennis J. Callahan
Jeffery M. Chiow

311 California Street, 10th Floor
San Francisco, CA 94104
Tele: 415-956-2828
Fax: 415-956-6457
Email: nodonnell@rjo.com

Attorneys for AHSC, NTHDC and CAHI

March 15, 2013

Plaintiffs Assisted Housing Services Corporation ("AHSC"), North Tampa Housing Development Corporation ("NTHDC") and California Affordable Housing Initiatives, Inc. ("CAHI") submit these responses to the Court's questions of March 5, 2013.

Question 1: Were the Court to determine that Section 8(b)(2) of the Housing and Community Development Act of 1974 ("1974 Act"), while now expired, continues to be grandfathered into the Housing Act of 1937 and to govern HUD's administration of the project-based rental assistance at issue, does the second sentence of Section 8(b)(2) give HUD the authority to administer the assistance through cooperative agreements with PHAs?

The second sentence of Section (8)(b)(2) of the 1974 Act, when combined with MAHRA, continues to give HUD the authority to administer assistance through cooperative agreements with PHAs to the extent that such PHA/owner projects were established prior to 1983. Without something more, however, since the repeal of Section 8(b)(2), it does not, either by itself, or in combination with MAHRA, permit HUD to establish new cooperative agreements with PHAs for Section 8 projects which HUD established on its own through HAP contracts directly with owners.

Until 1983, the first sentence of Section 8(b)(2) authorized HUD to enter into HAP contracts with owners who agreed to construct or substantially rehabilitate housing for at least partial occupancy by lower-income families. The second sentence of that Section also permitted HUD to enter into annual contributions contracts (ACCs) with PHAs that themselves made HAP contracts with such owners. The relevant regulations for New Construction at 24 C.F.R. Part 880 were issued in 1974 and were adopted for Substantial Rehabilitation at 24 C.F.R. §881.503. They permitted the parties to agree to convert a PHA/owner project to a HUD/owner project or vice versa (24 C.F.R. §880.505(c)) although it is not apparent from the administrative record that any such conversions took place before

1983. The 1983 repeal of Section 8(b)(2) ended both the first and second sentence authority to establish any new projects while providing that HUD was to honor contracts for projects that were already in place.

Fourteen years later, in 1997, Congress passed MAHRA in part as a response to the initial wave of expirations of contracts that had been entered into under Section 8(b)(2). As discussed in our earlier briefing and at oral argument, AHSC views MAHRA as accomplishing an essential but relatively modest task. It simply permitted the Secretary to renew expiring contracts using funds that were appropriated for that purpose but it did not change the underlying character of any projects.[1] See MAHRA §524(a)(1). Nothing about MAHRA remade Section 8(b)(2) contracts into Section 8(b)(1) contracts. Similarly its straightforward renewal provision did not transform HUD's own projects entered into directly with owners under the first sentence of 8(b)(2) into PHA selected and administered projects under the second sentence of that section.

It is in this context that AHSC understands the Court's reference to the grandfathering of the pre-1983 Section 8(b)(2) into the 1974 Act. Because the HAP contracts under first sentence 8(b)(2) projects and the ACCs with PHAs under second sentence 8(b)(2) projects were renewed not transformed, they were still categorized and administered consistent with their origins under 8(b)(2). MAHRA (§512(2)(B)(1)) and the Act itself (42 U.S.C. §1437f(d)(2)(B)(i) and (ii)) recognized 8(b)(2) projects as a continuing category of housing under the Act. And there were no new regulations established for these renewed programs. Instead they continued to be governed by the same set of regulations

[1] Since MAHRA was passed, Congress has typically appropriated funds for Section 8 housing primarily for renewal of contracts under existing projects rather than for any particular programs. See AR 18092 (FY 1997) and AR 1533 (FY 2013).

initially established for New Construction and Substantial Rehabilitation programs in 1974 when those were active programs under Section 8(b)(2) to which new projects could be added. But nothing in that ongoing recognition of the origins of these projects in the administration of these projects changes that Section 8(b)(2) itself was repealed in 1983, ending the ability to establish new contracts under it. And it does not change that, while MAHRA permitted the renewal of the agreements funding these projects, it did not authorize altering the nature of the projects themselves years after they were established.

For reasons discussed in the response to Question 2, in order to resolve this case the Court need not reach the question of whether the grandfathering of Section 8(b)(2) might mean something more. Specifically the question as to whether the second sentence of Section 8(b)(2) might, despite its repeal, continue to provide authority for establishing new cooperative agreements for HUD/owner projects converted to PHA/owner projects under 24 C.F.R. §880.505(c) is unnecessary to resolution of this matter since the record does not support that any such conversion has occurred.

Question 2: To what extent are the Plaintiffs' arguments dependent upon the premise that, having originally entered into HAP contracts pursuant to the first sentence of Section 8(b)(2), HUD is required to continue to act pursuant to this specific authority (as opposed to the authority granted under the second sentence of the same subsection) into perpetuity with respect to a particular assistance contract? Relatedly, how do the Plaintiffs interpret or explain 24 C.F.R. §880.505(c)?

AHSC, NTHDC and CAHI's position in this litigation is not dependent upon the premise that HUD is required to continue to act in perpetuity pursuant to the authority of the first sentence of Section 8(b)(2) for HUD/owner projects. The HUD/owner projects that account for the vast majority of the Section 8(b)(2) contracts in the NOFA portfolio were entered into under the authority of the first sentence of section 8(b)(2). Nothing has

even if the Agency wanted to "convert" these NOFA portfolio projects to make them PHA projects, HUD lacks regulatory authority to do so.

Question 3: If HUD is required to provide the renewal assistance at issue through HAP contracts with project owners, such that any contracts it enters into with other entities for the provision of contract administration services related to the HAP contracts are procurement contracts subject to the Competition in Contract Act ("CICA"), may HUD legally limit competition for these contracts to PHAs? If so, what is the specific legal basis for such a limitation?

HUD may limit the competition for these performance-based service contracts to PHAs by virtue of the discretion agencies enjoy under CICA.

CICA allows an agency to fashion a solicitation in a way that has the effect of reducing competition. Restrictive requirements, are permitted to the extent necessary to satisfy an agency's legitimate needs. 41 U.S.C. §3306(A)(2); *Savantage Fin. Servs. v. United States*, 86 Fed. Cl. 700, 704 (Fed. Cl. 2009), *aff'd*, 595 F.3d 1282 (Fed. Cir. 2010). "The determination of an agency's minimum needs 'is a matter within the broad discretion of agency officials . . . and is not for this court to second guess.'" *CHE Consulting, Inc. v. United States*, 74 Fed. Cl. 742, 747 (2006). The agency's determination will be upheld unless it had no rational basis. *Savantage*, 86 Fed. Cl. at 704.

Restricting performance to PHAs would provide HUD its desired benefits of a public/private partnership and give HUD confidence in offerors' ability to perform these services, while still ensuring competition. This approach has worked well since 1999, as demonstrated by the robust price competition under the 2011 Invitation. AR 317-318. A restriction to PHAs (without a geographic qualification) would be akin to an experience requirement that GAO has found reasonable. *Scientific Industries, Inc.*, B-208307, 83-1 CPD ¶ 361. Thus, under CICA, HUD could reasonably conclude that its minimum needs

require it to invite offers only from PHAs. Such a decision would be subject to review in a future bid protest, but is not a matter before this Court.

Question 4: All parties appear to agree that prior to the expiration of HUD's "(b)(2)" authority, HUD entered into various ACCs with PHAs pursuant to the second sentence of that subsection. On page 8 (footnote 7) of its opening brief, Plaintiffs AHSC et al. states that the contracts associated with these projects are not at issue in the instant matter, because "the HAP contract administration would not be HUD's to contract out." However, the 1999 RFP expressly noted that approximately 4,200 HAP contracts for project-based Section 8 housing were at that time being administered by various PHAs, but that "[w]hen HUD renews the[se] expired project-based HAP contracts ... HUD generally expects to transfer contract administration of the renewed HAP Contracts to the Contract Administrator (CA) it selects through this RFP for the service area where the property is located." AR 428

AHSC, NTHDC and CAHI recognize that the Court addressed this question "in particular" to HUD. HUD should be able to provide the specifics as to the exact status of these contracts. Counsel for these plaintiffs, however, now understand something that they did not at the time of their initial brief. Even though the PHA/owner projects are supposedly under the control of the PHAs who entered into them and, therefore, HUD should not be free to contract out the administration of the contracts associated with them, beginning in 2007, HUD removed contract administration from those sponsoring PHAs as the ACCs were renewed. Specifically HUD directed as a condition of continued funding that PHAs that had been acting as TCAs transfer "the responsibility for contract administration" for those PHA/owner agreements "to the PBCA with jurisdiction for the geographic area where the project is located." See Exhibit 3, Feb 7, 2007, Memorandum to TCAs from the Director, Office of Housing Assistance Contract Administration Oversight, attached to Plaintiffs' Motion to Supplement the Administrative Record of March 15, 2013. In 2007, that transfer was for all PHA/owner projects on which the contracts had been renewed to that point. As these plaintiffs expect that HUD will confirm, since 2007, the administration of further

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
(BID PROTEST)

CMS CONTRACT MANAGEMENT, et al. **Plaintiffs,** **v.** **THE UNITED STATES,** **Defendant.**	**Nos. 12-852, 853, 862, 864, 869** **Judge Thomas C. Wheeler**

PLAINTIFF THE JEFFERSON COUNTY ASSISTED HOUSING CORPORATION'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE COURT'S REQUEST FOR SUPPLEMENTAL BRIEFING

Robert K. Tompkins
PATTON BOGGS, LLP
2550 M Street, NW
Washington, D.C. 20037
Telephone: (202) 457-6000
Facsimile: (202) 457-6315
Counsel for Plaintiff The Jefferson County Assisted Housing Corporation

Of Counsel:
Elizabeth M. Gill
Trevor Tullius
PATTON BOGGS LLP
2550 M Street, NW
Washington, DC 20037

ARGUMENT

In accordance with the Court's March 5, 2013 Order, Plaintiff, The Jefferson County Assisted Housing Corporation ("JeffCo"), submits this Post-Hearing Supplemental Brief.

As a preliminary matter, we note the HAP contracts covered under the PBCA program are almost all now in the "Renewal" phase. As discussed extensively the Protesters' briefs, the authority for these Renewals stems from the Multifamily Assisted Housing Reform and Affordability Act of 1997 ("MAHRA"). MAHRA does not purport to change the underlying statutory authority pursuant to which the HAP contracts were awarded and it does not purport to change the character of the HAP contracts themselves. It simply clarifies the U.S. Department of Housing and Urban Development's ("HUD") authority to renew the existing housing assistance payment ("HAP") contracts. Consistent with this, HUD has relied explicitly on MAHRA as the Renewal authority. This is memorialized in its contemporaneous documentation related to the Renewal process. *See e.g.* AR 2013-AR 2022. Other than in this litigation, HUD has never suggested that MAHRA or the Renewal process resulted in a conversion of the underlying assistance contracts.

> **Question 1: Were the Court to determine that Section 8(b)(2) of the Housing and Community Development Act of 1974 ("1974 Act"), while now expired, continues to be grandfathered into the Housing Act of 1937 and to govern HUD's administration of the project-based rental assistance at issue, does the second sentence of Section 8(b)(2) give HUD the authority to administer the assistance through cooperative agreements with PHAs?**
>
> Answer: ***The second sentence of Section (b)(2) permitted HUD to use ACCs with PHAs to provide and administer assistance to Owners and likely permitted the use of an assistance agreement, however HUD has not used the approach called for in the second sentence of Section (b)(2) in the PBCA contracting initiative at issue here.***

As the Court's questions note, Section (b)(2) of 42 U.S.C. 1437f, as it existed prior to 1983, contains two distinct sentences representing two distinct approaches to New Construction and Substantial Rehabilitation project based rental assistance ("PBRA"). The first sentence provides for

HUD to contract directly with and make direct payments to Owners (either private owners or PHA owners) and for HUD to administer the assistance. The vast majority of PBRA projects have been awarded under this authority as evidenced by the 1999 RFP which notes that HUD had entered and administered more than 20,000 such HAP contracts with Owners. AR 428.

The second sentence of Section (b)(2) provided HUD an alternative approach – to enter into annual contribution contracts ("ACCs") with PHAs pursuant to which such entities may enter into HAP contracts with owners. While precise statistics are not in the record, it appears that approximately 4,200 projects were administered through this secondary approach, as evidenced through the 1999 RFP. AR 428.

The two alternatives provide for fundamentally different approaches to the administration of the PBRA program. In the "First Sentence" scenario, which represents the vast majority of cases, HUD entered the HAP contracts directly with the Owner, HUD made the assistance payments directly to the Owner, and – until 1999 -- HUD administered the HAP contracts with HUD's own employees. HUD's regulations defined projects under this approach as being "Private-Owner/HUD Projects." 24 C.F.R. 880.201.

In the "Second Sentence" scenario, which HUD used in a relatively limited number of cases, HUD relied on PHAs to prepare and submit proposals to HUD, typically with a project owner, although in some cases the PHA itself owned the project. If HUD accepted the project it would enter an ACC with the PHA and the PHA would then directly enter a HAP contract with the Owner. The ACC between HUD and the PHA would bundle together both the HAP funding and the Administrative Fee for the PHA. HUD's regulations defined projects under this approach as being "Private-Owner/PHA Projects." 24 C.F.R. 880.201. These arrangements also fall under the heading of a Traditional ACC contract with the PHA serving as a "Traditional Contract Administrator" ("TCA"), as discussed in our prior briefing, and are fundamentally distinct from the

PBCA contracts at issue in this case. *See e.g.* JeffCo Cross-Motion for Judgment and Response to Defendant's Motion to Dismiss at pp. 16-19.

The distinctions between the two approaches go beyond the mere definitions set out in the regulations governing New Construction (24 C.F.R. Part 880) and Substantial Rehabilitation (24 C.F.R. Part 881). In particular 880.505(a) provides that for the "First Sentence" projects, or "Private-Owner/HUD Projects," HUD is primarily responsible for contract administration, and that for "Second Sentence" projects or "Private-Owner/PHA Projects," the PHA is generally responsible for contract administration.

Again, the First Sentence of Section (b)(2) vests the contract administration authority solely in HUD; there is no mention of PHAs or any language to suggest authority for an assistance agreement. That said, HUD does have the inherent authority to contract out to a service provider to meet its obligations. However, there is no authority provided in the First Sentence to use an assistance relationship in Private-Owner/HUD Projects.[1] Second Sentence projects, or Private-Owner/PHA Projects, proceed very differently, and HUD uses a Traditional Contract Administrator with the PHA, which then provides the assistance to the Owner.

We believe it is beyond dispute that the PBCA contracts are not "Second Sentence" or "Private-Owner/PHA Projects" and that the PBCA contract is distinct from the Traditional ACC contract. While the status of the Traditional ACC contract arising arise under the Second Sentence is not directly before this court, we believe the Traditional ACC construct and the language of the Second Sentence could be construed as creating authority to use an assistance instrument.

Given the limited involvement of HUD in providing and administering the assistance in a Private-Owner/PHA Project we believe there is likely not sufficient substantial involvement by

[1] A discussed in our briefs, HUD has the inherent authority to contract out for services using a procurement contract. *See* JeffCo Cross-Motion for Judgment and Response to Defendant's Motion to Dismiss at p. 2.

HUD to qualify the arrangements as a cooperative agreement under the Federal Grant and Cooperative Agreement Act, 31 U.S.C. § 6305. That said, the question of whether there is "substantial involvement" is only addressed after one determines: A) that there is authority to use an assistance arrangement; and B) that the principal purpose of the instrument is to transfer a thing of value and not for the agency to acquire services for its own benefit or use. 31 U.S.C. §§6303-6305. The Court's question relates to the first issue: whether the Second Sentence of 1437f(b)(2) provided HUD with statutory authority to use an assistance agreement when it used the Private-Owner/PHA approach. JeffCo's answer is: it likely does.

> **Question 2: To what extent are the Plaintiffs' arguments dependent upon the premise that, having originally entered into HAP contracts pursuant to the first sentence of Section 8(b)(2), HUD is required to continue to act pursuant to this specific authority (as opposed to the authority granted under the second sentence of the same subsection) into perpetuity with respect to a particular assistance contract? Relatedly, how do the Plaintiffs interpret or explain 24 C.F.R. § 880.505(c)?**
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> **Answer: *No conversion is taking place here and it is unclear whether HUD could enter into a new cooperative agreement under the Second Sentence of (b)(2) through a conversion or otherwise.***

As made clear by the terms of the Second Sentence, and as discussed at length in Protesters' prior briefs, the terms of the Traditional ACC contracts and underlying HAP contracts are fundamentally distinct from the PBCA HAP contracts and the PBCA contracts themselves, which are the instruments at issue in this case. *See e.g.* AR 1929. While HUD most often proceeded under the First Sentence of (b)(2) – the Private-Owner/HUD approach – HUD adopted regulations which suggests that, at least in theory, it had the authority to convert a project from one project type to another, namely 24 C.F.R. 880-505(c). However, once HUD settled on an approach for administering the Project – either under the First Sentence or the Second Sentence – making a switch would not be easy and it would not be a mere formality. The two approaches, both as set forth in the statutory language and in the regulations HUD prescribed, are fundamentally different

It is questionable whether HUD now has the authority to enter a new cooperative agreement using the Second Sentence of Section (b)(2) as the authority to do so. However, HUD does have the inherent authority to enter into procurement contracts for services to perform those functions it would otherwise be required to perform itself. To this end, Plaintiffs' arguments are not dependent on HUD being explicitly required to continue to act pursuant to the First Sentence of (b)(2). However, in effect HUD likely is required to do so because it appears the authority to enter new cooperative agreements no longer exists. This implicitly limits HUD to a single choice: continuing to treat the HAP contracts as Private-Owner/HUD contracts, which is exactly what it has done.

In any event, HUD has never purported to "convert" projects in the PBCA program and certainly has not gone in the direction of turning Private-Owner/HUD Projects into Private-Owner/PHA contracts, at least not in the context of the PBCA program. The current NOFA and PBCA contract attached to it merely continue the Private-Owner/HUD approach.

> **Question 3: If HUD is required to provide the renewal assistance at issue through HAP contracts with project owners, such that any contracts it enters into with other entities for the provision of contract administration services related to the HAP contracts are procurement contracts subject to the Competition in Contract Act ("CICA"), may HUD legally limit competition for these contracts to PHAs? If so, what is the specific legal basis for such a limitation?**
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> **Answer: *Yes. Under CICA, HUD may legally limit competition for the contract administration services to PHAs.***

The record demonstrates that the principal purpose of the PBCA contracts is for HUD to acquire the services of a PHA for the direct benefit or use of the Government and, therefore, the contracts are procurement contracts to which the Competition in Contracting Act ("CICA") is applicable.[2] The purpose of CICA is to promote and obtain full and open competition in federal procurements. *See generally* 41 U.S.C. § 3301 et seq. CICA and its implementing regulations require

[2] HUD admits that in preparing the NOFA, it did not consider the requirements of CICA or the Federal Acquisition Regulation.

that contracting officers "use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement." 41 U.S.C. § 3301(a)(2); *see also* 48 C.F.R. § 6.101(b). CICA is not inflexible and does permit a federal agency to limit competition in certain specified situations. *See generally* 41 U.S.C. §§ 3303, 3304. An agency may exclude particular sources, exclude contractors based on size, and use noncompetitive procedures when appropriate. *Id.* However, regulation and precedent only permit such limitations on competition "to the extent necessary to satisfy the needs of the agency or as authorized by law." 48 C.F.R. § 11.002(a)(1)(i); *Savantage Fin. Servs. v. United States,* 86 Fed. Cl. 700, 704 (Fed. Cl. 2009), *aff'd,* 595 F.3d 1282 (Fed. Cir. 2010).

The determination of an agency's needs is a matter of broad discretion of the agency. *See Witt & Assoc. v. United States*, 62 Fed. Cl. 657, 662 (2004). If HUD requires a certain type of entity to serve as contract administrators, it has the discretion to make this determination even if it would have the effect of limiting competition. In *ABF Freight Sys.*, the court noted that even where the structuring of the solicitation into bundled regional areas may have the effect of eliminating some bidders who are not large enough to perform regional contracts, such a structure was not shown to be in violation of law or lacking a rational basis. *See ABF Freight Sys., Inc. v. United States*, 55 Fed. Cl. 392, 409 (2005). The court noted that "the law is well-settled that the determination of the agency's procurement needs and the best method for accommodating them are matters primarily with the agency's discretion". *Id.*

A solicitation for contract administration services must have a rational relationship with HUD's minimum needs, must not be unduly restrictive and should be written in a non-restrictive manner as possible in order to enhance competition and invite innovation. *ABF Freight Sys., Inc.* at 395. The administrative record and the history of HUD's procurement of contract administration services via the PBCA contracts provide HUD with the requisite rationale to limit the competition

to PHAs. The PHAs provide specific experience and expertise for the contract administration services and HUD has acknowledged this fact. *See* AR 490 ("Current and potential applicants have experienced personnel and readily available resources to perform the service.") Moreover, the procurements for the PBCA contracts in 1999 and 2011 demonstrate that even when limited to PHAs, there is sufficient competition. In the 53 jurisdictions included in the 2011 process, 42 had at least two bidders competing for the contract. AR 220. Limiting the competition to PHAs is not unduly restrictive, satisfies HUD's minimum needs for knowledgeable and specialized administrators for the PBCA contracts and still enhances competition as PHAs can submit offers in multiple jurisdictions. A solicitation that limits offerors to one type of competitor is not per se improper. CICA permits and precedent supports that if there is a rational basis for HUD to limit competition for PBCA contracts to PHAs, then such a limitation will withstand scrutiny.

> **Question 4: All parties appear to agree that prior to the expiration of HUD's "(b)(2)" authority, HUD entered into various ACCs with PHAs pursuant to the second sentence of that subsection. On page 8 (footnote 7) of its opening brief, Plaintiffs AHSC et al. states that the contracts associated with these projects are not at issue in the instant matter, because "the HAP contract administration would not be HUD's to contract out." However, the 1999 RFP expressly noted that approximately 4,200 HAP contracts for project-based Section 8 housing were at that time being administered by various PHAs, but that "[w]hen HUD renews the[se] expired project-based HAP contracts ... HUD generally expects to transfer contract administration of the renewed HAP Contracts to the Contract Administrator (CA) it selects through this RFP for the service area where the property is located." AR 428.**
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> **The Court therefore requests HUD, in particular, to clarify the current status of these rental assistance contracts, and whether or not they are in the portfolio of contracts covered by the 2012 NOFA.**
>
> **Answer:** ***HUD's treatment of the 4,200 Private-Owner/PHA contracts identified in the 1999 RFP is consistent with the fact that HUD has primary responsibility for the PBRA projects.***

As the Court notes, HUD's 1999 RFP announced that, upon HUD's renewal of the 4,200 Private-Owner/PHA Projects it expected to "transfer" contract administration for those projects to the PBCA contractor, making them in effect Private-Owner/HUD Projects. AR 428. That process

is still on-going, as evidenced by HUD's own statistics. *See e.g.*, Defendant's Reply Brief, p. 7, fn 5. However, there is no suggestion in the 1999 RFP, in MAHRA or in the HUD documentation regarding HUD's Renewal of projects that HUD's assignment of these projects to the PBCA portfolio was being carried out pursuant to a Section 505(c) conversion. Consistent with the concept that the PBRA program is HUD's program, it appears that HUD has simply brought and continues to bring all PBRA projects into the realm of HUD administered assistance, consistent with HUD's typical approach to the PBRA program.

As a practical matter, there is nothing in the administrative record to suggest that HUD has utilized 13 C.F.R. §880.505(c) conversions in the PBCA program. The 20,000+ HAP contracts covered by the PBCA program were Private-Owner/HUD Projects. AR 428 ("HUD administers the ... 20,000 [contracts]"). HUD's maintaining primary responsibility for these HAP contracts, and the limited role HUD prescribed for PBCAs, are consistent with the Private-Owner/HUD approach, which has clearly been maintained throughout the PBCA program. The projects under the PBCA program are and remain Private-Owner/HUD, or First Sentence, projects. With respect to the 4,200 Private-Owner/PHA Projects there is no evidence that they were brought into the PBCA program by means of a Section 505(c) conversion. While HUD has devoted a substantial amount of guidance to the "Renewal" Process, there is absolutely no mention of Section 505(c) conversion in that guidance.[3] Rather as previously discussed, HUD's Renewal authority is predicated on MAHRA, which again places the HAP renewal obligation solely on HUD and does not mention any role for PHAs. MAHRA certainly does not provide authority for HUD to use an assistance relationship.

[3] The Renewal Guide does address a different type of conversion: converting assistance to tenant or voucher based assistance to ensure tenant's are not cut off when a project ceases to be a part of the PBRA program. This type of conversion is not contemplated by 505(c), which discusses conversions from one PBRA approach to another.

BID PROTEST

No. 12-852C (Consolidated)
(Honorable Thomas C. Wheeler)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CMS CONTRACT MANAGEMENT SERVICES, et. al.,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
Defendant.

PLAINTIFFS CMS CONTRACT MANAGEMENT SERVICES' AND THE HOUSING AUTHORITY OF THE CITY OF BREMERTON'S SUPPLEMENTAL BRIEF ADDRESSING FOUR ISSUES RAISED BY THE COURT

COLM P. NELSON, WSBA #36735
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
(206) 447-4400
Attorney of Record for Plaintiffs CMS Contract Management Services and The Housing Authority of the City of Bremerton

Section 8(b)(2) authority to execute new HAP Contracts was repealed under the Housing and Urban-Rural Recovery Act of 1983. Pub. L. No. 98-181, 97 Stat. 1153, 1183 (1983). In 1997, Congress recognized that without "*new* budget authority" to renew expiring HAP Contracts "many of the FHA-insured multifamily housing projects that are assisted with project-based assistance are likely to default." 111 Stat. 1384, 1386, § 511(a)(8) (1997) (emphasis added). To avoid the defaults and "to preserve low-income rental housing affordability and availability," Congress created new authority to renew expiring HAP Contracts under Section 524 of MAHRA titled "Section 8 Contract Renewal Authority." 111 Stat. 1384, 1387, § 511(b)(1); 111 Stat. 1384, 1408, § 524 (1997) (emphasis added), *amended by* Pub. L. No. 106-74, 113 Stat. 1047, 1109-1116, § 531 (1999).

Under MAHRA, HUD continues to play a central role in administering HAP Contracts. Section 524 is replete with examples of "the Secretary's" obligations. These include the duty, upon an owner's request, to "renew an expiring contract in accordance with terms and conditions prescribed by the Secretary," 111 Stat. 1384, 1408, § 524(a)(2) (emphasis added), *amended by* Pub. L. No. 106-74, 113 Stat. 1047, 1109-1116, § 531 (1999).[1] MAHRA does not, however, envision a fundamental shift in *who* administers the HAP Contract renewals. MAHRA's plain language and legislative history, as well as the administrative record, do not reflect any Congressional intent, for instance, to transfer contract administration functions from HUD to PHAs, as the Government has suggested.

[1] Subsequent amendments to Sec. 524 reinforce Congress' emphasis that HUD play a central role in administering its HAP contracts. *See* Pub. L. No. 106-74, 113 Stat. 1047, 1109-1116, § 531 (1999). The amendments further confirm that in most instances, upon the request of the owner, HUD shall renew the HAP Contract.

For over thirty years before MAHRA, HUD distributed billions of dollars in assistance through thousands of HAP Contracts for Owner/HUD projects across the nation. This assistance and these HAP Contracts were administered exclusively by HUD, the Contract Administrator of its own HAP Contracts. 24 C.F.R. § 880.201 ("Contract Administrator. The entity which enters into the Contract with the owner *and* is responsible for monitoring performance by the owner. The contract administrator is a PHA in the case of private-owner/PHA projects, and HUD in private-owner/HUD and PHA-owner/HUD projects.") (emphasis added).

If Congress had intended for PHAs to administer all HAP Contracts, including the many thousands that were at the time being administered by HUD, one would expect some expression of this intent in either MAHRA or its legislative history. Sections 513 through 520 of MAHRA, for instance, provide a framework for the restructuring of troubled, project-based, FHA-insured projects. 111 Stat. 1384, 1389-1405. These provisions give HUD new authority to retain "participating administrative entities" under a "cooperative agreement" to facilitate the restructurings. 111 Stat. 1384, 1390, § 513(a)(2)(A). MAHRA, in contrast, does not create new authority for HUD to retain "administrators" under a "cooperative agreement" to assist HUD in administering HUD's portfolio of HAP Contracts. Although Congress had the opportunity to require HUD to transfer HAP Contract administration functions to PHAs using cooperative agreements, it chose not to. Congress instead chose to preserve the *status quo* by giving HUD new authority to continue providing assistance through the existing channels under HAP Contract renewals. This is why MAHRA designates numerous, critical renewal and administration functions for HUD to perform, consistent with its pre-MAHRA role. 24 C.F.R.

§ 402.1 ("HUD will renew project-based assistance contracts under the authority provided in section 524 of MAHRA.").

HUD has recognized that MAHRA preserved and extended the character of and framework for Section 8 assistance. HUD's materials and handbooks, updated regulations, and website continue to distinguish HAP Contracts (including renewals) by the subprograms under which they were originally created, principally New Construction, Substantial Rehabilitation, State Housing Agencies, Loan Management Set Aside, and Property Disposition.[2] If MAHRA had fundamentally altered the landscape and framework for Project-Based Housing Assistance, HUD's governing materials and regulations would have been adjusted accordingly. Under the new renewal authority, the regulations have essentially remained unchanged consistent with MAHRA's command that HUD continue to administer assistance and renew HAP Contracts.

HUD, of course, has also always recognized that MAHRA preserved HUD's central role in the Project-Based Housing Assistance Program. HUD's understanding of this role was demonstrated when HUD unilaterally rolled approximately 4,200 PHA-administered HAP Contracts into its PBCA portfolio for HUD to administer, albeit with the assistance of administrators.

It is under MAHRA, therefore, that HUD has the authority and obligation to administer assistance for Owner/HUD Projects, just as it had under the first sentence of Section 8(b)(2). HUD has no authority, however, either under MAHRA or Section 8(b)(2), to hire administrators

[2] *See e.g.*, AR 2499-500, "Multifamily Housing – Section 8 Background Information – HUD"; AR 1736-7, Catalog of Federal Domestic Assistance, *Regulations, Guidelines, and Literature (140)* (2012) (citing "24 C.F.R. 880 - Section 8 Housing Assistance Payments Program for New Construction; 24 C.F.R. 881 - Section 8 Housing Assistance Payments Program for Substantial Rehabilitation; 24 C.F.R. 883 - Section Housing Assistance State Housing Agencies.").

using cooperative agreements to assist HUD in administering its own HAP Contracts. HUD must administer its HAP Contracts itself or hire other "entities" under "505(a)" to administer these contracts on HUD's behalf. 24 C.F.R. § 880.505(a) ("The PHA or HUD may contract with another entity for the performance of some or all of its contract administration functions."); *See also* 24 C.F.R. § 881.503, 24 C.F.R. § 884.119. When HUD chooses to contract with another entity to perform this work, it must use a procurement contract because it has no authority under Section 8(b)(2) or MAHRA to use a cooperative agreement in that case.

2. To what extent are the Plaintiffs' arguments dependent upon the premise that, having originally entered into HAP contracts pursuant to the first sentence of Section 8(b)(2), HUD is required to continue to act pursuant to this specific authority (as opposed to the authority granted under the second sentence of the same subsection) into perpetuity with respect to a particular assistance contract? Relatedly, how do the Plaintiffs interpret or explain 24 C.F.R. § 880.505(c)?

MAHRA envisions "renewal" of the existing HAP Contracts and, therefore, an uninterrupted continuation of the existing contractual relationships. 111 Stat. 1384, 1408, § 524 (1997), *amended by* Pub. L. No. 106-74, 113 Stat. 1047, 1109-1116, § 531 (1999). Having originally entered into HAP Contracts pursuant to the first sentence of Section 8(b)(2), HUD will continue renewing such contracts pursuant to MAHRA.

Under original New Construction and Substantial Rehabilitation regulations, a Contract Administrator's obligation to continue administering assistance did not continue in perpetuity. The obligation ended when the contract was terminated or expired or when the project underwent a "conversion." A project could be converted from an Owner/HUD project to an Owner/PHA Project and vice-versa, under specific "conversion" procedures.[3] 24 C.F.R. § 1273.103(x); 24 C.F.R.

[3] AR 2637.

3. If HUD is required to provide the renewal assistance at issue through HAP contracts with project owners, such that any contracts it enters into with other entities for the provision of contract administration services related to the HAP contracts are procurement contracts subject to the Competition in Contract Act ("CICA"), may HUD legally limit competition for these contracts to PHAs? If so, what is the specific legal basis for such a limitation?

HUD has no statutory authority independent of CICA to restrict competition. Its own regulations anticipate any "entity" performing administrator services. Under CICA, however, HUD could limit competition for the contracts to "responsible sources," which would include many PHAs like CMS that have a successful track record of administering ongoing contracts. CICA's requirement for full and open competition is fulfilled when "all responsible sources are permitted to submit sealed bids or competitive proposals."[8]

CICA requires that contracting officers use competitive procedures "best suited to the circumstances of the contract action and consistent with the need to fulfill the Government's requirements efficiently." 48 C.F.R. § 6.101(b). Those officers may use restrictive provisions only "to the extent necessary to satisfy the needs of the agency or as authorized by law." 48 C.F.R. § 11.002(a)(1)(ii). While CMS will not argue that HUD could *never* restrict competition to PHAs, based on the record before the Court, HUD has not demonstrated that such a restriction on competition would withstand scrutiny under CICA.

4. All parties appear to agree that prior to the expiration of HUD's "(b)(2)" authority, HUD entered into various ACCs with PHAs pursuant to the second sentence of that subsection. On page 8 (footnote 7) of its opening brief, Plaintiffs AHSC et al. states that the contracts associated with these projects are not at issue in the instant matter, because "the HAP contract administration would not be HUD's to contract out." However, the 1999 RFP expressly noted that approximately 4,200 HAP contracts for project-based Section 8 housing were at that time being administered by various PHAs, but that "[w]hen HUD renews the[se] expired project-based HAP contracts ... HUD generally expects to transfer

[8] 41 U.S.C. § 107.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
(BID PROTEST)

CMS CONTRACT MANAGEMENT SERVICES, *et al*,	)	
Plaintiffs,	)	No. 12-852C (and consolidated cases)
v.	)	
THE UNITED STATES,	)	Judge Thomas C. Wheeler
Defendant.	)	

PLAINTIFF NATIONAL HOUSING COMPLIANCE'S
POST-HEARING SUPPLEMENTAL BRIEF

In accordance with the Court's March 5, 2013 Order, Plaintiff, National Housing Compliance ("NHC"), submits this Post-Hearing Supplemental Brief, which addresses the issues raised by the Court as follows.

1. Court's Question: Were the Court to determine that Section 8(b)(2) of the Housing and Community Development Act of 1974 ("1974 Act"), while now expired, continues to be grandfathered into the Housing Act of 1937 and to govern HUD's administration of the project-based rental assistance at issue, does the second sentence of Section 8(b)(2) give HUD the authority to administer the assistance through cooperative agreements with PHAs?

   Short Answer: Although the second sentence of Section 8(b)(2) provides the United States Department of Housing and Urban Development ("HUD") with the authority to provide assistance to Public Housing Agencies ("PHA") for PHA/Owner Projects via Traditional Annual Contributions Contracts ("ACC"), which can be labeled as cooperative agreements because they provide assistance to the PHAs and owners, the second sentence of Section 8(b)(2) does not provide HUD with the authority to enter into cooperative agreements with PHAs for the Performance-Based Contract Administration ("PBCA") services it is seeking to obtain through

Performance-Based ACCs ("PB ACC") pursuant to the 2012 Notice of Funding Availability ("NOFA").

Detailed Response: The statutory provision referenced by the Court, Section 8(b)(2), contains two sentences which grant authority. The first sentence of Section 8(b)(2) states, in part, that "the Secretary is authorized to make assistance payments pursuant to contracts with owners or prospective owners who agree to construct or substantially rehabilitate housing . . . ," and provides authority for the United States Department of Housing and Urban Development ("HUD") to provide assistance directly to the qualifying property owners. 42 U.S.C. § 1437f(b)(2) (1975). Under the New Construction and Substantial Rehabilitation Program, projects entered into under the authority granted in this first sentence are Private-Owner/HUD projects. 24 C.F.R. § 880.201.

The second sentence of Section 8(b)(2) states that "[t]he Secretary may also enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to such owners or prospective owners," and provides authority for HUD to provide assistance to the PHAs. 42 U.S.C. § 1437f(b)(2) (1975). Under the New Construction and Substantial Rehabilitation Program, projects entered into under the authority granted in this second sentence are Private-Owner/PHA projects. 24 C.F.R. § 880.201.

For Private-Owner/PHA projects, the PHA found a suitable owner. The PHA then entered into a Traditional ACC with HUD, pursuant to which HUD provided assistance to the PHA. The PHA independently entered into a Housing Assistance Payment ("HAP") contract with the private owner. AR 2677. Under a Traditional ACC, the PHA serves as a Traditional Contract Administrator ("TCA"), which involves a more expanded scope of responsibilities. AR

1929. The principal purpose of the Traditional ACC was to provide assistance to the PHAs and owners, and therefore, could be labeled a cooperative agreement. AR 2669-70.

As stated above, although the second sentence of Section 8(b)(2) provides HUD with authority to provide assistance to PHAs via a Traditional ACC, which can be labeled a cooperative agreement because it provides assistance to the PHA and the PHA is responsible for administering the project, it does not provide HUD with the authority to enter into cooperative agreements with PHAs for the PBCA services it is seeking to obtain through PB ACCs pursuant to the 2012 NOFA. This is because the PB ACC does not include or involve any payment of assistance to the PHA; instead, it pays the Performance-Based Contract Administrators a fee in return for the performance of services. In addition, unlike the TCAs, which have entered into HAP contracts directly with the private owners, the Performance-Based Contract Administrators are assigned by HUD the HAP contracts for which HUD is responsible and to which HUD remains a party.

2. Court's Question: To what extent are the Plaintiffs' arguments dependent upon the premise that, having originally entered into HAP contracts pursuant to the first sentence of Section 8(b)(2), HUD is required to continue to act pursuant to this specific authority (as opposed to the authority granted under the second sentence of the same subsection) into perpetuity with respect to a particular assistance contract? Relatedly, how do the Plaintiffs interpret or explain 24 C.F.R. § 880.505(c)?

   Short Answer: Plaintiffs' arguments are not dependent on the premise that HUD is locked in, for perpetuity, to the authority initially granted by either the first sentence or the second sentence of Section 8(b)(2) with respect to a particular assistance contract. With regard to 24 C.F.R. § 880.505(c), although a conversion of a Private-Owner/HUD project to a Private-Owner/PHA project may be theoretically possible under this regulation, nothing in the record

with these projects are not at issue in the instant matter, because "the HAP contract administration would not be HUD's to contract out." That HUD, not the TCA, planned to renew the expiring HAP contracts is consistent with the requirement in MAHRA that HUD renew expiring Section 8 project-based HAP contracts. MAHRA § 524(a); *see also* 24 C.F.R. § 402.1 ("HUD will renew project-based assistance contracts under the authority provided in section 524 of MAHRA."); § 402.4(a) ("*Initial Renewal.* (1) HUD may renew any expiring Section 8 project-based contract . . . ."); 71 Fed. Reg. 2112 (Jan. 12, 2006) (explaining that "MAHRA require[s] HUD, at the request of the owner, to renew an expiring Section 8 contract, with two exceptions.").

Ultimately, regardless of 24 C.F.R. § 880.505(c), there is nothing in the administrative record or HUD's history to indicate that it has done so or that it has any reason to do so because it would be contrary to its admittedly successful outsourcing program. Instead, HUD created the PBCA program, in which HUD has contracted out some of its contract administration services in accordance with 24 C.F.R. § 880.505(a).

3. Court's Question: If HUD is required to provide the renewal assistance at issue through HAP contracts with project owners, such that any contracts it enters into with other entities for the provision of contract administration services related to the HAP contracts are procurement contracts subject to the Competition in Contract Act ("CICA"), may HUD legally limit competition for these contracts to PHAs? If so, what is the specific legal basis for such a limitation?

   Short Answer: Yes, if HUD is required to use procurement contracts subject to CICA to acquire the contract administration services, HUD may legally limit the competition for these contracts to PHAs. [2]

[2] We note, however, consistent with the position taken by NHC in its previous briefs, that NHC does not believe that the record provides a basis for justification for any further restriction of the competition solely to in-state PHAs.

Detailed Response: CICA, as implemented by the Federal Acquisition Regulation ("FAR"), requires that contracting officers use competitive procedures "that are best suited to the circumstances of the contract action and consistent with the need to fulfill the Government's requirements efficiently." 48 C.F.R. § 6.101(b). Restrictive provisions are permissible, but only "to the extent necessary to satisfy the needs of the agency or as authorized by law." 48 C.F.R. § 11.002(a)(1)(ii); *Savantage Fin. Servs. v. United States*, 86 Fed. Cl. 700, 704 (Fed. Cl. 2009), *aff'd*, 595 F.3d 1282 (Fed. Cir. 2010). "The determination of an agency's minimum needs 'is a matter within the broad discretion of agency officials . . . and is not for this court to second guess.'" *CHE Consulting, Inc. v. United States*, 74 Fed. Cl. 742, 747 (2006) (finding reasonable the agency's limitation of the competition to the Original Equipment Manufacturers and disagreeing that this limitation discriminated against a class of vendors)(*quoting Wit Assocs., Inc. v. United States*, 62 Fed. Cl. 657, 662 (2004)). The court will not overturn an agency's determination unless there is no rational basis for the agency's decision. *Savantage*, 86 Fed. Cl. at 704.

The history of the PBCA program and the specialized knowledge and experience of the PHAs provides HUD with sufficient justification to limit the competition for these contracts to PHAs. In this regard, a reasonable determination by HUD does not require concrete evidence that only PHAs can perform the work. *See Savantage*, 595 F.3d at 1286 (*quoting CHE Consulting*, 552 F.3d at 1355) ("[A]n agency 'has no obligation to point to past experiences substantiating its concerns in order to survive rational basis review . . . [as CICA does not require the agency] to supply a historical record of failures to substantiate a risk.'").

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BID PROTEST

CMS CONTRACT MGMT. SVCS., ET AL., **Plaintiff,** **v.** **THE UNITED STATES,** **Defendant.**	**Case Nos. 12-852C, 12-853C, 12-862C, 12-864C, and 12-869C** **Judge Wheeler**

PLAINTIFF SOUTHWEST HOUSING COMPLIANCE CORPORATION'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE COURT'S REQUEST FOR SUPPLEMENTAL BRIEFING

Plaintiff Southwest Housing Compliance Corporation ("SHCC"), through undersigned counsel, hereby submits this Supplemental Brief in response to the Court's request for supplemental briefing issued on March 5, 2013.

Richard J. Vacura
MORRISON & FOERSTER LLP
1650 Tysons Blvd., Suite 400
McLean, VA 22102
(703) 760-7764
(703) 760-7349 (fax)
Counsel of Record for Plaintiff Southwest Housing Compliance Corporation

Of Counsel:
Tina D. Reynolds
K. Alyse Latour
MORRISON & FOERSTER LLP

Dated: March 15, 2013

ARGUMENT

This Supplemental Brief addresses the questions posed by the Court on March 5, 2013 and reiterates that the U.S. Department of Housing and Urban Development ("HUD") must use a procurement contract to obtain the contract administration services for the Section 8 project-based rental assistance solicited under the 2012 NOFA.

1. HUD DOES NOT HAVE THE AUTHORITY TO ADMINISTER THE SECTION 8 PROJECT-BASED RENTAL ASSISTANCE AT ISSUE IN THIS CASE THROUGH COOPERATIVE AGREEMENTS.

Section 8(b)(2) of the Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 201(a), 88 Stat. 633, 662 (1974) (the "1974 Act"), consists of two sentences, each of which provides separate authority for the administration of Section 8 project-based rental housing assistance. The first sentence of Section 8(b)(2) states, in part, that "the Secretary is authorized to make assistance payments pursuant to contracts with owners or prospective owners who agree to construct or substantially rehabilitate housing in which some or all of the units shall be available for occupancy by lower-income families in accordance with the provisions of this section." 1974 Act, § 8(b)(2). The second sentence of Section 8(b)(2) states that "[t]he Secretary may also enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners or prospective owners." *Id.* Although the second sentence of Section 8(b)(2) gives HUD the authority to administer some of the assistance through Annual Contributions Contracts ("ACCs"), which may be properly characterized as "cooperative agreements" since their principal purpose is to provide assistance to the PHAs and the project owners, this sentence does not grant HUD the authority to administer the assistance at issue under the 2012 NOFA for the Project Based Contract Administrator ("PBCA") Program.

Under Section 8(b)(2), HUD may provide for assistance through two possible means. As directed by the first sentence of Section 8(b)(2), HUD may provide the assistance directly to the project owners (the "Private-Owner/HUD Projects"). 1974 Act, § 8(b)(2). Alternatively, under the authority conferred in the second sentence of Section 8(b)(2), HUD may grant a PHA the ability to provide housing assistance directly to owners pursuant to an agreement between HUD and the PHA (the "Private-Owner/PHA Projects"). *Id.*

Pursuant to the authority in the first sentence of Section 8(b)(2), HUD administers approximately 20,000 Private-Owner/HUD Projects. AR 428. In the Private-Owner/HUD Projects, HUD enters into a housing assistance payment ("HAP") contract directly with the project owner that provides for the housing subsidies. The Private-Owner/HUD Projects make up the vast majority of the projects that are the subject of the 2012 NOFA and included in the PBCA portfolio. As PBCAs, the PHAs perform contract administration services for these Private-Owner/HUD Projects.

The authority granted to HUD in the second sentence of Section 8(b)(2) permits HUD to enter into ACCs with PHAs through which HUD provides the housing subsidies to the PHAs. The PHAs then independently enter into HAP contracts with the project owners. As Traditional Contract Administrators ("TCAs") under these ACCs, the PHAs have primary responsibility for the administration of the HAP contracts. *See* 24 C.F.R. § 880.505(a). Under this authority, approximately 4,200 Private-Owner/PHA Projects were created. AR 428.

As noted above, while the second sentence of Section 8(b)(2) confers authority on HUD to enter into ACCs with PHAs for the Private-Owner/PHA Projects, it does not provide the same authority for the PBCA services that HUD is procuring under the 2012 NOFA. This conclusion is based on the fundamental differences between the Private-Owner/HUD and the Private-

Owner/PHA Projects, in particular, the very different roles of the PHA under each of these Projects. Thus, a traditional ACC (as used in the Private-Owner/PHA Projects) may be labeled a "cooperative agreement" because its principal purpose is to provide assistance to the ACC, but a PBCA ACC cannot be deemed a cooperative agreement because it does not provide assistance to the PHA, but rather provides for payment of an administrative fee in exchange for the performance of contract administration services. In order to use the authority in the second sentence of Section 8(b)(2) to issue cooperative agreements rather than contracts, HUD would have to fundamentally change the nature of the services the PHA provides under the PBCA Program.

Moreover, Congress expressed its intent to maintain the distinct nature of these projects through its silence in the renewal authority for Section 8(b)(2). The Multifamily Assisted Housing Reform and Affordability Act of 1997, Pub. L. No. 105-65, 111 Stat. 1344 (1997) (codified at 42 U.S.C. §1437f note) ("MAHRA"), was enacted to renew HUD's authority to provide assistance under Section 8(b)(2). MAHRA did not transform the Private-Owner/HUD Projects to Private-Owner/PHA Projects. In fact, MAHRA did nothing more with respect to the Section 8(b)(2) assistance other than simply authorize the Secretary of HUD to "use amounts available for the renewal of assistance under Section 8..." MAHRA, §524(a). If Congress had intended to effect a transformation or otherwise change the nature of the Private-Owner/HUD Projects, it would have provided for such. Instead, Congress remained silent, signaling its desire to maintain the *status quo*.

greater control over these projects, and permitted HUD to then obtain the services of the PHAs as PBCAs rather than as TCAs. As a result, the 4,200 Private-Owner/PHA Projects are not treated any differently than Private-Owner/HUD Projects.

Consistent with HUD's movement towards more complete authority over the administration of the project-based rental assistance, HUD exercised its authority in 24 C.F.R. § 880.505(a) to create the PBCA Program and to "contract with another entity for the performance of some or all of its contract administration functions." 24 C.F.R. § 880.505(a). Accordingly, since the principal purpose of the PBCA ACCs is to obtain services from the PHA that HUD would otherwise be required to perform, HUD must use a procurement contract.

3. HUD MAY LEGALLY LIMIT COMPETITION FOR THE PBCA CONTRACTS TO PHAs BY GIVING GREATER WEIGHT TO THE KNOWLEDGE AND EXPERIENCE OF THE PHAs.

We have previously briefed the Court regarding the utter lack of record regarding any consideration HUD may have given to limitations or restrictions on competition in this case. If, however, the Court finds that the PBCA services sought by HUD must be obtained through a procurement contract subject to the Competition in Contracting Act ("CICA"), HUD would have a reasonable basis to restrict competition to PHAs.

CICA, as implemented by the Federal Acquisition Regulation, requires contracting officers to use competitive procedures "that are best suited to the circumstances of the contract action and consistent with the need to fulfill the Government's requirements efficiently." 48 C.F.R. § 6.101(b). Restrictive provisions are permissible, but only "to the extent necessary to satisfy the needs of the agency or as authorized by law." 48 C.F.R. § 11.002(a)(1)(ii); *see also Savantage Fin. Servs. v. United States*, 86 Fed. Cl. 700, 704 (Fed. Cl. 2009), *aff'd*, 595 F.3d 1282 (Fed. Cir. 2010) (finding that the U.S. Department of Homeland Security could permissibly

restrict full and open competition by requiring an offeror to have an integrated asset, acquisition, and financial management systems solution which the plaintiff had alleged effectively resulted in a sole source award). For almost 15 years, HUD has limited awards under the PBCA Program to PHAs. The PHAs possess specialized knowledge of the PBCA Program and the functions of a contract administrator and are the entities (other than HUD) that have adequate experience in performing these tasks. Based on the PHAs' specialized knowledge and unique experience, HUD could reasonably limit the competition for the PBCA Program to the PHAs. *See Savantage*, 595 F.3d at 1286.

To that end, agency acquisition officials have broad discretion in selecting the evaluation factors that will be used in an acquisition, and the use of particular evaluation factors will not be disturbed so long as the factors used reasonably relate to the agency's needs in choosing a contractor that will best serve the government's interest. *Dayton T. Brown, Inc.*, B-402256, Feb. 24, 2010, 2010 CPD ¶ 72; *PDL Toll*, B-402970, Aug. 11, 2010, 2010 CPD ¶ 191; *see also* 48 C.F.R. § 15.304(b). In this case, HUD could create an evaluation scheme pursuant to which greater weight is given to offerors with the technical knowledge about how to perform contract administration services for project-based rental assistance programs and that favors those with prior experience as a PBCA. The effect of such an evaluation scheme could reasonably and legally limit the competition for the PBCA Program to PHAs.

4. HUD HAS TRANSFERRED MANY OF THE PRIVATE-OWNER/PHA PROJECTS TO THE PBCA PORTFOLIO, AND CONTINUES TO DO SO.

As discussed above in Section 2, HUD acquired control over 4,200 Private-Owner/PHA Projects and transferred the contract administration of these projects to the PBCAs. It is SHCC's understanding that HUD continues to transfer remaining Private-Owner/PHA Projects to the PBCA portfolio.

BID PROTEST

No. 12-852, -853, -862, -864, -869C
(Judge Wheeler)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CMS CONTRACT MANAGEMENT SERVICES, et al.,

Plaintiffs,

v.

THE UNITED STATES.

Defendant.

GOVERNMENT'S RESPONSE TO REQUEST FOR SUPPLEMENTAL BRIEIFNG

STUART F. DELERY
Deputy Principal Assistant Attorney General

JEANNE E. DAVIDSON
Director

KIRK T. MANHARDT
Assistant Director

DOUGLAS K. MICKLE
Senior Trial Counsel
Civil Division
Commercial Litigation Branch
United States Department of Justice
PO Box 480
Ben Franklin Station
Washington, DC 20044
Tel: (202) 307-0383
Fax: (202) 353-7988

Attorneys for Defendant

OF COUNSEL:

JOSEPH A. PIXLEY
Trial Attorney
Civil Division
Commercial Litigation Branch
United States Department of Justice

DORIE FINNERMAN
KATHIE SOROKA
Office of General Counsel
U.S. Department of Housing and Urban Development
Washington, D.C.

March 15, 2013

Question 3:

If HUD is required to provide the renewal assistance at issue through HAP contracts with project owners, such that any contracts it enters into with other entities for the provision of contract administration services related to the HAP contracts are procurement contracts subject to the Competition in Contract Act ("CICA"), may HUD legally limit competition for these contracts to PHAs? If so, what is the specific legal basis for such a limitation?

Government's Response:

HUD does not see a way to reconcile the 1937 Act with the requirements of the Competition in Contract Act (CICA). The considerations HUD set forth in the November 19, 2011 memorandum from the Federal Housing Commissioner to the HUD Secretary (AR 1), and the October 19, 2011 letter from HUD to the Government Accountability Office (GAO) (AR 6), forcefully demonstrate that fact. If the Court concludes that the ACCs at issue are procurement contracts and that HUD cannot use cooperative agreements as a funding vehicle, then presumably the Court will have found that the principal purpose of the ACC was to acquire services for the direct benefit of HUD. *See* 31 U.S.C. § 6303. The Court also would have made the corollary finding that the principal purpose of the ACC was not to assist PHAs to address the shortage of housing affordable to low-income families. *See* 31 U.S.C. § 6305. These conclusions are at odds with HUD's interpretation of the 1937 Act, and HUD does not see how the 1937 Act's references to PHAs are relevant in light of these findings.

Further, limiting the competition to PHAs would likely mean that HUD would have to administer 53 procurement contracts - one for each jurisdiction. If these 53 procurement contracts are not intended to be in accord with a statutory mandate to assist PHAs but are rather intended to be for HUD's benefit, a limitation on competition to PHAs does not seem to be in HUD's best interest, and it is certainly inconsistent with the mandates of CICA. Because there is no language in the 1937 Act that would either obligate or allow HUD to limit competition to

PHAs if the Court finds that ACCs are procured for HUD's direct benefit, such findings by the Court would seem to suggest that the 1937 Act does not apply to the ACCs at issue and CICA would require full-and-open competition.

Question 4:

All parties appear to agree that prior to the expiration of HUD's "(b)(2)" authority, HUD entered into various ACCs with PHAs pursuant to the second sentence of that subsection. On page 8 (footnote 7) of its opening brief, Plaintiff AHSC *et al.* states that the contracts associated with these projects are not at issue in the instant matter, because "the HAP contract administration would not be HUD's to contract out." However, the 1999 RFP expressly noted that approximately 4,200 HAP contracts for project-based Section 8 housing were at that time being administered by various PHAs, but that "[w]hen HUD renews the[se] expired project-based HAP contracts ... HUD generally expects to transfer contract administration of the renewed HAP Contracts to the Contract Administrator (CA) it selects through this RFP for the service area where the property is located." AR 428. The Court therefore requests HUD, in particular, to clarify the current status of these rental assistance contracts, and whether or not they are in the portfolio of contracts covered by the 2012 NOFA.

Government's Response

Of the 4,200 HAP contracts administered by PHAs as of May 1999, 2,676 HAP contracts have been transferred to and are administered by PBCAs,[8] including the protestors, pursuant to ACCs awarded over a decade ago. All HAP contracts that are currently being administered by PBCAs pursuant to that ACC constitute the current portfolio addressed by the 2012 NOFA. 1,524 HAP contracts remain with the original PHA contract administrators pending transfer upon either the expiration of that PHA's ACC or HAP contract renewal under MAHRA.[9]

[8] Protestors have used the terms "performance-based contract administrator" or a "PBCA" and "traditional contract administrators" or a "TCA." PBCAs and TCAs are PHAs. The only distinction is that a PHA selected under the NOFA at issue is a PBCA while the PHAs who administered the 4,200 HAP contracts are referred to as TCAs.

[9] Of the 1,524 HAP contracts not transferred into the NOFA portfolio as of January 2013, 1,101 are original HAP contracts, and 423 are Renewal Contracts.

Further, of the approximately 20,000 HAP contracts that HUD was administering in 1999, only 402 HAP contracts were being administered by HUD as of January 2013. The remainder have been transferred to and are administered by PBCAs. It has been HUD's intention since 1999 that the Section 8 project-based portfolio administered by performance-based contract administrators (PBCAs) include the entirety of the Section 8 project-based rental assistance inventory with as few exceptions as possible.[10]

These transfers of responsibility for administration of HAP contracts demonstrate that there is nothing in the 1937 Act or MAHRA that compels any entity (either HUD or a PHA) that is acting as the contract administrator to do so in perpetuity. Protestors have conceded that it is permissible for a PHA to administer project-based Section 8 rental assistance pursuant to a cooperative agreement with HUD *(i.e.*, the ACC) but only for projects in which HUD never acted as the contract administrator. Yet protestors argue that, if HUD acted as the initial contract administrator, a PHA can subsequently become a contract administrator only via an ACC awarded pursuant to a CICA process and compliant with the Federal Acquisition Regulation (FAR). When one considers the 4,200 HAP contracts administered by PHAs, protestors' argument is not only unsupported by any statutory mandate, but it also makes no sense. In their view, the PHAs administer these HAPs in accordance with undisputed cooperative agreements (ACCs), but once the ACC expires or the HAP contract is renewed under MAHRA, and the HAP contract is transferred to a different PHA, the new PHA must administer the contract in accordance with a CICA and FAR-compliant procurement contract.

[10] These exceptions are generally when HUD determines that the PBCA has a conflict of interest (for example, a board member is affiliated with the management company for the project).

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
(BID PROTEST)

CMS CONTRACT MANAGEMENT SERVICES; THE HOUSING AUTHORITY OF THE CITY OF BREMERTON; NATIONAL HOUSING COMPLIANCE; ASSISTED HOUSING SERVICES CORP.; NORTH TAMPA HOUSING DEVELOPMENT CORP.; CALIFORNIA AFFORDABLE HOUSING INITIATIVE; NAVIGATE AFFORDABLE HOUSING PARTNERS; SOUTHWEST HOUSING COMPLIANCE CORP.; AND MASSACHUSETTS HOUSING FINANCE AGENCY,	
Plaintiffs,	
v.	**Nos. 12-852, -853, -862, -864, -869**
	Judge Thomas C. Wheeler
THE UNITED STATES,	
Defendant.	

JOINT NOTICE OF APPEAL

Notice is respectfully given that Plaintiffs, Navigate Affordable Housing Initiative ("Navigate"); CMS Contract Management Services ("CMS"); The Housing Authority Of The City Of Bremerton ("HACB"); National Housing Compliance ("NHC"); Assisted Housing Services Corp. ("AHSC"); North Tampa Housing Development Corp. ("NTHDC"); California Affordable Housing Initiative ("CAHI"); and Southwest Housing Compliance Corp. ("SHCC"), in the above referenced cases hereby file this *Joint* Notice of Appeal, *see* Fed. R. App. P. 3(b)(1), to the United States Court of Appeals for the Federal Circuit from: (i) the Judgment entered on April 30, 2013 (Docket No. 102), granting Judgment on the Administrative Record to the United States on behalf of the Department of Housing and Urban Development and denying the relief

sought by Plaintiffs in these cases; (ii) the April 19, 2013 "Opinion and Order," as modified (including on April 22, 2013) (Docket No. 98); (iii) the April 22, 2013 "Order" (Docket No. 101); (iv) any and all interlocutory, underlying or other orders, opinions, rulings, decisions and/or findings, whether written or oral, which are not referenced above; and (v) any and all interlocutory, underlying or other orders, opinions, rulings, decisions and/or findings, whether written or oral, that support, underlie, or relate to the orders in these cases or that merge into the final judgment.

May 10, 2013

Respectfully submitted,

/S/Robert K. Tompkins
Robert K. Tompkins
PATTON BOGGS LLP
2550 M Street, NW
Washington, D.C. 20037
Telephone: (202) 457-6000
Facsimile: (202) 457-6315
Counsel for Plaintiff Navigate Affordable Housing Partners on behalf of Plaintiffs[1]

Of Counsel:

Michael J. Schaengold
Elizabeth M. Gill
Trevor Tullius
PATTON BOGGS LLP
2550 M Street, NW
Washington, DC 20037
(202) 457-6000

[1] This Joint Notice of Appeal, *see* Fed. R. App. P. 3(b)(1), is filed on behalf of all Plaintiffs listed in the case caption on the first page of this document with the exception of the Massachusetts Housing Finance Agency.

TOM HORNE
ATTORNEY GENERAL

OFFICE OF THE ARIZONA ATTORNEY GENERAL
PUBLIC ADVOCACY & CIVIL RIGHTS DIVISION
AGENCY COUNSEL SECTION

PAMELA LINNINS
ASST. ATTORNEY GENERAL
DIRECT PHONE NO.
602.364.1523
PAMELA.LINNINS@AZAG.GOV

November 16, 2011

Ms. Deborah K. Lear, Director
Office of Housing Assistance Contract Administration Oversight
United States Department of Housing and Urban Development
451 7th St., SW
Room 6151
Washington, DC 20410
deborah.k.lear@hud.gov

Re: Project-Based Contract Administration ("PBCA") contract awards

Dear Ms. Lear:

I represent the Arizona Department of Housing ("Department") and have been asked to provide you with a brief summary of the Department's legal position concerning the inadvisability of HUD appointing an out-of-state public housing authority ("PHA") to administer the Arizona based Section 8 PBCA contract. This letter does not represent the formal or informal opinion of Arizona Attorney General. The Arizona Attorney General is only authorized to provide legal advice to the State of Arizona, its Agencies and state officials acting in their official capacity, therefore, this letter is also not intended to be relied upon by third parties as legal advice. The Department believes that HUD's own codes, regulations and handbook do not permit giving a Section 8 PBCA contract to an out-of-state entity for administration within the territorial borders of Arizona.

HUD provides rental subsidies to property owners which in turn benefits low-income tenants, a program that the Department has administered in Arizona for the past decade. This subsidy is authorized by Section 8 of the United States Housing Act of 1937, as amended by the Housing and Community Development Act of 1974 ("Act"). 42 U.S.C. § 1437 et. seq. PHAs, also known as affordable housing agencies, are regulatory in nature and are creatures of both state and federal statute. 24 C.F.R. § 5.100 defines PHAs as "... any State, county, municipality, or other governmental entity or public body, or agency or instrumentality of these entities, that is *authorized* to engage or assist in the development or operation of low-income housing under the 1937 Act." (emphasis added).

The Department is established by A.R.S. § 41-3952 and given the powers and duties authorized by A.R.S. § 41-3953. The Department is the only entity authorized to act as a state-wide PHA in Arizona and is also the only Arizona-based PHA permitted to accept federal money in exchange for carrying out housing assistance payment programs, including PBCA duties. In Arizona, PHAs may also be established by cities, counties or towns, as authorized by A.R.S. § 36-1404. However, all of these agencies are mandated to carry out activities that benefit the

residents of their jurisdiction.

PHAs are a means by which states, and political subdivisions of the state, remedy unsafe housing conditions and the shortage of affordable housing for low-income families, all in furtherance of the stated policy contained in Section 2 of the Act. The Public Housing Development Handbook promulgated by HUD specifies that "an eligible PHA is one that has both the *legal authority and the local cooperation* required for developing, owning and operating a public housing project under the Act, the regulation (24 C.F.R. 841), and this Handbook." (See Public Housing Development Handbook, Chapter 2, Section 2-2) (emphasis added).

Given the nature of the work that PHAs carry out on a daily basis, it is implicit in the definition of a PHA that they are *local* to the geographic area in which they operate. Many of the day to day responsibilities are more expeditiously handled by the Department because the Department is able to physically visit the housing project, which in turn expedites day to day business and operations for all parties. In *Baker v. Cincinnati Metropolitan Housing Authority*, 675 F. 2d 836, 839 (1982), the court considered the issue of tenant-based housing funds. That court found that the Act encourages local decision-making, stating: "It is the policy of the United States ... to vest in *local* public housing agencies the maximum amount of responsibility in the administration of their housing programs." (citing to 42 U.S.C. § 1437) (emphasis added).

The power of states to act, legislate or regulate has historically been limited to that state's own territorial jurisdiction. While an entity can be licensed to conduct business in its home state, that license does not automatically and lawfully allow the entity to go to another state to conduct its business without first becoming appropriately licensed in the jurisdiction that it wishes to conduct business. In *Yavapai County v. O'Neil*, 3 Ariz. 363, 377-378, 29 P. 430, 433 (1892), the Arizona Territory Supreme Court found that the power to act within the territory has no extraterritorial vitality, as there is no legal effect outside of the territorial boundaries. This finding was relied upon and further discussed by the Supreme Court of Arizona in *Maricopa County v. Norris*, 49 Ariz. 323, 236, 66 P. 2d 258, 259 (1937), when it stated "it is obvious the Legislature of Arizona has no power to extend the jurisdiction of its courts or their processes beyond the state's boundaries. The laws of the state and officers in their enforcement are confined to the state." These points of law continue to hold true today, not just for Arizona but for any state attempting to extend its authority into Arizona.

Given the regulatory nature of public housing authorities, as well as the statutory scheme under which they arise, PBCA contracts were, and are, most appropriately carried out by the PHA physically located in the state where the properties are located. If a foreign agency or entity comes in to a state to carry out such tasks it would be contrary to federal and state legislative intent, as well as local licensing requirements. The Department is not aware of any other entity, public or private, other than itself that currently has appropriate statutory authority to administer project-based rental assistance contracts for HUD within the borders of Arizona.

Yours Truly,

Pamela J. Linnins
Assistant Attorney General

Cc: Carol Ditmore, Asst. Deputy Director/Operations - Arizona Department of Housing

2396349

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE

1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

Public: (916) 445-9555
Telephone: (916) 322-6124
Facsimile: (916) 324-8835
E-Mail: Julia.Bilaver@doj.ca.gov

June 18, 2012

Victor J. James
Acting General Counsel
California Housing Finance Authority
500 Capitol Mall, Suite 1400
Sacramento, California 95814

RE: Request for Advice on the Jurisdictional Authority of a Local Housing Authority and an Out-of-State Housing Authority Under State Law

Dear Mr. James:

This letter responds to your request for legal advice on the jurisdictional authority of local and out-of-state housing authorities to operate statewide in California. Your questions relate to a Notice of Funding Availability issued by the United States Department of Housing and Urban Development ("HUD") for its Performance-Based Contract Administrator Program. In connection with this federal program, you have asked for advice on the following state law issues:

Discussion

1. Does a local housing authority have legal authority to operate throughout the entire state?

Although there is no case or statute precisely on point, our review of the relevant authorities leads us to conclude that a local housing authority likely lacks the necessary legal authority to operate statewide.

Public housing is generally administered through local housing authorities pursuant to the Housing Authorities Law. (Health & Saf. Code, § 34200 et seq.)[1] The Housing Authorities Law creates in each county and city a local housing authority to provide safe and sanitary dwellings to persons of low income. (§§ 34201, 34240, 34242, 34312, 34315, 34322.) California has more than 80 local housing authorities operating in various areas throughout the state. The rights,

[1] All statutory references are to the Health and Safety Code unless otherwise provided.

duties, powers and privileges of a housing authority are vested in its board of commissioners, who are appointed by local county or city officials. (§§ 34275, 34290.)

We have previously advised that the operation of a housing authority is local in nature, being essentially limited to a defined geographic area. (64 Ops.Cal.Atty.Gen. 677 (1981).) Under the Housing Authorities Law, the area of operation of a housing authority is a defined term. The area of operation of a city housing authority is the city and the area within five miles of its territorial boundaries, except it does not include any area which lies within the territorial boundaries of another city. (§ 34208.) For a county housing authority, the area of operation is the unincorporated areas of the county, and any incorporated areas of the county upon consent of the incorporated area. (§ 34209.) The area of operation of an area housing authority is the combined possible areas of operation of the participating cities and counties. (§ 34247.) We believe these definitional provisions indicate that the Legislature intended to limit the jurisdictional powers of a local housing authority to the geographic area in which it operates.[2]

This conclusion is supported by case law. In *Torres v. Board of Commissioners of the Housing Authority of Tulare County* (1979) 89 Cal.App.3d 545 (*Torres)*, the court determined that local housing authorities are not "state agencies" even though they administer matters of state concern because they are local in scope and character, restricted geographically in their area of operation, and do not have statewide power or jurisdiction. (*Torres, supra,* 89 Cal.App.3d at 550.)

2. Does a corporation or other instrumentality formed by a local housing authority have legal authority to exercise the statutory powers of a local housing authority throughout the entire state?

A local housing authority which lacks legal authority to operate statewide may not delegate authority it does not have to operate statewide to a corporation or other instrumentality.

As described above, we view the powers of a local housing authority as being limited to the geographic area in which it operates. The issue then is whether a corporation or other instrumentality formed by one or more local housing authorities may exercise power outside of the geographic area in which the creating authorities operate. In *Cabrillo Community College Dist. v. California Junior College Assoc.* (1975) 44 Cal.App.3d 367 (*Cabrillo College*), the court considered a similar issue. In that case, several community colleges created an association to regulate athletic competition among its member colleges. The association imposed a local residency requirement on student athletes. The new requirement, however, was at odds with state law, which does not require students to be residents of a community college district to gain admission. The court held that when the member colleges created the association, they delegated

[2] See *Housing Authority of City of Los Angeles v. City of Los Angeles* (1953) 40 Cal.2d 682, 687 (city housing authority did not exceed jurisdiction by developing a housing project on a site outside the city where city agreed to annex the site).

some of their power to the association and they could only delegate as much power as they themselves derive by statute. (*Cabrillo College, supra*; 44 Cal.App.3d at 372.) Thus, the association could not exercise greater power than its member colleges.

Applying *Cabrillo College*, a local housing authority cannot delegate more power than it has. If the legal authority of one or more local housing authorities is limited to a certain geographic area, then the legal authority of a corporation or instrumentality formed by the authorities is similarly limited.

3. Does a local housing authority have legal authority to accept a federal grant for a housing project that is outside its territorial jurisdiction?

A local housing authority which lacks legal authority to operate statewide may not accept a federal grant for a housing project that lies outside its defined area of operation.

A valid administrative action must be within the scope of authority conferred by statute. (*US Ecology, Inc. v. State of California* (2001) 92 Cal.App.4th 113, 131-132.) As a creature of statute, a local housing authority may not exceed the powers given to it by the Legislature. Section 34311, subdivision (d) authorizes local housing authorities to make and execute contracts necessary or convenient to the exercise of its powers. In addition, section 34315.3 authorizes local housing authorities to accept financial or other assistance from any public or private source for activities permitted by state law. More specifically, section 34327, subdivision (a) authorizes a local housing authority to borrow money or accept grants or other financial assistance from the federal government for any housing project that is "within its area of operation." As described above, we view the powers of a local housing authority as being limited to the geographic area in which it operates. Thus, we believe the grants of power in the three statutes above are also limited and only apply to housing projects and programs within a local housing authority's geographic area of operation.

4. Does an out-of-state housing authority have legal authority to exercise the powers of a housing authority in California?

An out of state housing authority lacks legal authority to exercise the powers of a housing authority in California.

As a sovereign state, California has a right to exercise its police power and the power of eminent domain to protect the safety, health, and welfare of its citizens. When enacting the Housing Authorities Law, the Legislature expressly declared that the shortage of safe and sanitary dwelling accommodations for persons of low income cause an increase in and spread of disease and crime and constitutes a menace to the health, safety, morals, and welfare of California residents. (§ 34201.) The Legislature has delegated some of its sovereign power to local housing authorities through the Housing Authorities Law to address these threats to public health and safety. A local housing authority may, among other things, acquire property, enter

into contracts, exercise the power of eminent domain, and issue bonds to finance its functions. (§ 34310 et seq.)

Like California, other states have passed laws creating housing authorities. But a housing authority created under the sovereign power of another state does not have authority to exercise that power in California. (See *Hall v. University of Nevada* (1972) 8 Cal.3d 522, 524.) Under our federal system of government, individual states may adopt distinct policies to protect their own residents and every state enjoys the same power. (*Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, 1205.) It is true that each state must give full faith and credit to the "public acts, records, and judicial proceedings" of every other state." (U.S. Const., art. IV, § 1.) But a state does not have to substitute another state's statutes in place of its own laws on a subject matter it is competent to govern. (*Baker by Thomas v. General Motors Corp.* (1998) 522 U.S. 222, 232.)

The Housing Authorities Law does not delegate powers to out-of-state housing authorities, and we are not aware of any other statutes that delegate the powers of a housing authority to out-of-state housing authorities. Thus, an out-of-state housing authority does not have legal authority to exercise the same powers as a housing authority in California.

5. Does a corporation formed by an out-of-state housing authority have legal authority to exercise the powers of a housing authority in California?

An out-of-state housing authority lacks legal authority to exercise the powers of a housing authority in California, and so would any corporations formed by it.

A corporation formed by an out-of-state housing authority can only exercise as much power as that out-of-state housing authority. (See *Cabrillo College, supra,* 44 Cal.App.3d at 372.) Because state law does not delegate any sovereign power to out-of-state housing authorities, a corporation formed by an out-of-state housing authority would also lack legal authority to exercise the powers of a local housing authority in California.

Sincerely,

JULIA A. BILAVER
Deputy Attorney General

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State of Connecticut

GEORGE C. JEPSEN
ATTORNEY GENERAL

Hartford

August 4, 2011

The Honorable Ronald F. Angelo, Jr.
Deputy Commissioner
Department of Economic and Community Development
505 Hudson Street
Hartford, Connecticut 06106

Dear Deputy Commissioner Angelo:

You have requested a legal opinion on whether an instrumentality of an out of state public housing authority may act as a public housing authority in Connecticut without being authorized to act as a public housing authority according to the requirements of Connecticut law. I conclude that an instrumentality of an out of state public housing authority may not act as a public housing authority in Connecticut without first being authorized to do so according to Connecticut law. The Connecticut statutes governing the creation and powers of public housing authorities are clear and constitute a pervasive regulatory scheme. It would be inconsistent with that pervasive regulatory scheme and the express terms of Connecticut law for any entity to act as a public housing authority without complying with the requirements of Connecticut law governing their creation and regulation.

The Connecticut General Assembly has determined that the provision of safe and sanitary housing for low and moderate income persons is a matter of necessity and in the public interest of the state. *See* Conn. Gen. Stat. § 8-38. Toward that end, the General Assembly has authorized the creation of public housing authorities throughout the state. *See* Conn. Gen. Stat. § 8-40. A "public housing authority" is defined in Connecticut law as either the Connecticut Housing Authority[1] or any public corporation created under the provisions of Conn. Gen. Stat. § 8-40. *See* Conn. Gen. Stat. § 8-39(b); *see also* Regs. Conn. State Agencies § 8-68d-1 (setting forth the same definition of "public housing authority"). Conn. Gen. Stat. § 8-40 requires that the governing body of any municipality wishing to create a public housing authority must pass a resolution declaring the need for such an authority. Conn. Gen. Stat. § 8-40 also expressly states that a housing authority

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[1] The Connecticut Housing Authority has been succeeded by the State Housing Authority, which is a subsidiary of the Connecticut Housing Finance Authority. *See* Conn. Gen. Stat. §§ 8-244c and 8-244b.

"shall not transact any business or exercise any powers hereunder until the governing body of the municipality" passes such a resolution.

Once a public housing authority is properly established, its powers and responsibilities are substantial. For example, a public housing authority may establish a police force, *see* Conn. Gen. Stat. § 8-44b, issue tax-exempt bonds, *see* Conn. Gen. Stat. §§ 8-244d, 8-252, and 8-52, acquire property by eminent domain, *see* Conn. Gen. Stat. § 8-50, and exercise supervisory authority over residential property, agents, managers, and tenant selection plans, *see* Conn. Gen. Stat. §§ 8-253a (7) (C) and (E); 8-44; 8-254a and 8-45. Additionally, public housing authorities in Connecticut are required to submit an annual report of their activities to the municipality they serve and to the Commissioner of Economic and Community Development. *See* Conn. Gen. Stat. § 8-68d. Such reports are required to include information relating to the housing authority's inventory of existing housing, new construction projects, and the number and types of housing sold, leased or transferred during the reporting period. *See* Regs. Conn. State Agencies § 8-68d-1. Indeed, the Connecticut Supreme Court has held that a public housing authority is a "creature of statute" and is "pervasively regulated" by the state. *See Connelly v. Housing Authority of the City of New Haven*, 213 Conn. 354, 361 (1990) (holding that a public housing authority is not subject to a private unfair trade practice claim because it is subject to a pervasive regulatory scheme that does not provide for such liability); *see also City of Norwich v. Housing Authority of Town of Norwich*, 216 Conn. 112, 122-23 (1990) (holding that public housing authorities are creatures of both the state and the municipality creating the authority).

Given the express provision of Conn. Gen. Stat. § 8-40 that housing authorities "shall not transact any business or exercise any powers" until they are created by the municipality they serve, the Connecticut Supreme Court's holding that a public housing authority is a "creature of statute" that is "pervasively regulated" by the state, and the significant powers a properly authorized housing authority possesses, it is my legal opinion that no instrumentality of an out of state housing authority may act as a public housing authority in Connecticut without first complying with the statutory requirements governing the creation and powers of public housing authorities as set forth in Connecticut law.

Very truly yours,

GEORGE JEPSEN
ATTORNEY GENERAL

GEORGE C. JEPSEN
ATTORNEY GENERAL

55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120

Office of The Attorney General
State of Connecticut

June 5, 2012

The Honorable Ronald F. Angelo, Jr.
Deputy Commissioner
Department of Economic and Community Development
505 Hudson Street
Hartford, Connecticut 06106

Dear Deputy Commissioner Angelo:

You have requested a legal opinion on whether a Connecticut municipal housing authority is authorized to act as a housing authority throughout the entire State of Connecticut. I conclude that a Connecticut municipal housing authority may only act as a housing authority within the geographical boundaries of the particular municipality forming the subject municipal housing authority, or, in the case of a regional housing authority, within the geographical boundaries of the two or more municipalities forming the subject regional housing authority.[1]

Housing authorities in Connecticut are creatures of statute, *Connelly v. Housing Authority of the City of New Haven*, 213 Conn. 354, 361 (1990), and the statutes governing the creation and powers of public housing authorities constitute a pervasive regulatory scheme, see Atty. Gen. Op. 2011-06. Conn. Gen. Stat. § 8-40 authorizes the creation of public housing authorities and provides that:

> In each *municipality* of the state there is created a public body corporate and politic to be known as the "housing authority" *of the municipality*; provided such authority shall not transact any business or exercise its powers hereunder *until the governing body of the municipality* by resolution declares that there is need for a housing authority *in the municipality*, provided it shall find (1) that insanitary or unsafe inhabited dwelling accommodations exist *in the municipality* or (2) that there is a shortage of safe or sanitary dwelling accommodations *in the municipality* available to families of low income at rentals they can afford or (3) that there is a shortage of

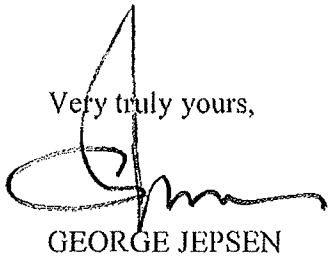
[1] Although there appears to be no express prohibition in Connecticut statute against every Connecticut municipality coming together to form one "regional" housing authority serving every municipality in the State, no such regional housing authority exists.

> safe or sanitary dwelling accommodations *in the municipality* available to families of moderate income at rentals they can afford. In determining whether dwelling accommodations are unsafe or insanitary, said governing body may take into consideration the degree of overcrowding, the percentage of land coverage, the light, air, space and access available to the inhabitants of such dwelling accommodations, the size and arrangement of the rooms, the sanitary facilities and the extent to which conditions exist in such buildings which endanger life or property by fire or other causes. The *governing bodies of two or more municipalities* may create a regional housing authority, which shall have all the powers, duties and responsibilities conferred upon housing authorities by this chapter and chapter 130. *The area of operation of such authority shall include the municipalities for which such authority is created*.

Conn. Gen. Stat. § 8-40 (emphasis added).

The above statutory language makes clear that a housing authority is created by and operates within the geographical boundaries of the municipality, or, in the case of a regional housing authority, municipalities which create the subject housing authority. *See also City of Norwich v. Housing Authority of Town of Norwich*, 216 Conn. 112, 122-23 (1990) (holding that public housing authorities are creatures of both the state and the municipality creating the authority). Nothing in § 8-40 suggests that one municipality may create and operate a housing authority outside its geographical boundaries (or the boundaries of a partner municipality with which it creates a regional housing authority) and such an interpretation would contravene long standing Connecticut law. *See Baker v. Norwalk*, 152 Conn. 312, 315 (1965) (holding that a municipality is a creature of the state and can exercise only such powers as are expressly granted to it). Therefore, it is my legal opinion that a Connecticut municipal housing authority may only act as a housing authority within the geographical boundaries of the particular municipality forming the subject municipal housing authority, or, in the case of a regional housing authority, within the geographical boundaries of the two or more municipalities forming the subject regional housing authority.

Very truly yours,



GEORGE JEPSEN
ATTORNEY GENERAL

JOSEPH R. BIDEN, III
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX (302) 577-6499
TTY (302) 577-5783

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE
Opinion No. 12-IB02
January 17, 2012

REQUESTED BY:

Mr. Anas Ben Addi, Director
Delaware State Housing Authority

OPINION BY:

Peter S. Feliceangeli, Deputy Attorney General
Delaware Department of Justice

and

Lawrence W. Lewis, State Solicitor
Delaware Department of Justice

RE: PUBLIC HOUSING AUTHORITIES IN DELAWARE

OPINION

You have asked what entities may serve as a public housing authority in Delaware, and, specifically, whether a corporate instrumentality of an out-of-state housing authority may operate as a public housing authority under Delaware law. For the reasons set out below, we conclude that only a housing authority that is established and operates under the exacting criteria prescribed by Delaware law may lawfully function as a public housing authority in Delaware.

Preliminarily, it should be noted that the General Assembly has determined that housing authorities are essential to the "health, safety, morals and welfare of the public" and constitute "public objects [that are] essential to the public interest." 31 *Del. C.* § 4302. *See also,*

Wilmington Housing Authority v. Williamson, 228 A.2d 787 (Del. 1967), which will be discussed later in this opinion.

The Delaware State Housing Authority ("DSHA") is the starting point for an examination of what housing authorities may lawfully operate in the State. DSHA is given broad authority under State law to develop and assist in the development and operation of public housing throughout Delaware.

DSHA is established in the Executive Department of State government to "serve as the Governor's staff agency in all general housing and community development matters." 29 *Del. C.* § 8602(1). The head of DSHA is designated as the State Housing Director. 29 *Del. C.* § 8603. DSHA is "a public corporation of perpetual duration," 31 *Del. C.* § 4010, that is vested with "authority and capacity" to "provide, and to assist others to provide, quality and affordable housing opportunities and appropriate supportive services to responsible low-and moderate-income Delawareans." 31 *Del. C.* § 4002(a)(1). DSHA is also responsible to "[c]oordinate the housing and redevelopment activities of state agencies and other public agencies and private bodies with such responsibilities within" Delaware. 31 *Del. C.* § 4002(a)(3).

DSHA's broad duties and functions, including the power of eminent domain and the authority to issue bonds, are set out in 31 *Del. C.* Ch. 40. Most significantly, DSHA is the source from which certificates for the creation of any local housing authority must issue after DSHA has first determined that there is a need for a proposed authority.

The deliberate process established by 31 *Del. C.* Ch. 43 for the formation of a housing authority shows that a corporate instrumentality of a non-Delaware housing authority would be incapable of acting as a public housing authority in Delaware.

A "housing authority" is defined as a corporate body that is organized pursuant to the provisions of 31 *Del. C.* Ch. 43, and a housing authority is declared by statute to be a "public body corporate or politic." 31 *Del. C.* § 4001(2). The essential governmental function of a housing authority is evident in the statement of legislative purpose in the statute providing for their creation. The General Assembly has determined that housing authorities are necessary "to promote and protect the health, safety, morals and welfare of the public," that a housing authority is a public corporate body, and that housing authorities "are public objects essential to the public interest." 31 *Del. C.* § 4302.

The formation or creation of a housing authority starts when "DSHA shall have determined that there is a need for a housing authority in any county or in any part of a county of the State," and DHSA then "issue[s]...a certification of such determination" for the formation of the authority. 31 *Del. C.* § 4303. The statutes describe in detail the manner in which the commissioners who constitute the local housing authority are appointed by the Governor and mayor of the most populous incorporated municipality in the area of operation of the new authority; the political balance that must be maintained among the commissioners; their terms of office; and the process for their removal for cause. *Id.* After the appointment of the original commissioners of the proposed new authority, the appointing officers file the certificates of appointment with the Secretary of State, and those certificates are "conclusive evidence of the due and proper creation of the [housing] authority." *Id.*

A local housing authority that is created by the statutorily prescribed method "constitute[s] a body corporate and politic, exercising public powers...." 31 *Del. C.* § 4308(a). All property owned or operated by a housing authority "is deemed public property for public use," 31 *Del C.* § 4312, and is "declared to be public property used for essential public purposes"

that is exempt from taxation. 31 *Del. C.* § 4318. A housing authority is responsible to provide housing for low-income persons, 31 *Del. C.* § 4308(a)(1); "may act as agent for the federal government in connection with the acquisition, construction, operation or management of a project", § 4803(a)(2); and has the power of eminent domain, § 4308(a)(3). A housing authority may not freely cease operations. Rather, the authority must "make application to DSHA for permission to dissolve" when it "desires to discontinue its operations," and the law controls how an authority dissolves. 31 *Del. C.* § 4317.

The question of the nature of a housing authority, which serves an essential public purpose, was before the Delaware Supreme Court in *Wilmington Housing Authority v. Williamson*, 228 A.2d 782 (Del. 1967). The issue was whether a housing authority was a state agency and thus able to raise the defense of sovereign immunity in a personal injury lawsuit. The Court commented on the "extensive powers conferred on" a housing authority by statute, 228 A. 2d at 786, and noted that 31 *Del. C.* §4302 declares housing authorities are "public objects essential to the public interest." 228 A. 2d at 786. The Supreme Court determined that a housing authority "is a state agency...." 228 A.2d 787. As the Court elaborated:

> The Authority is described by law as 'a body both corporate and politic, exercising public powers.'...The terms 'public corporate body' or 'public corporation' are generic; they describe any corporate instrumentality *created by the State for public purposes and with the object of administering a portion of the powers of the State*....We think it clear that the Authority before us is a state agency created to discharge a public object essential to the public interest.

228 A.2d at 787, citations omitted, emphasis added.

The Delaware Supreme Court recognized, then, that a housing authority, created by the State, through the DSHA, for the public purposes of promoting and protecting the health, safety, and welfare of Delawareans, is a public object essential to the public interest and, therefore, is a

State agency. It is virtually impossible to think that an out-of-state entity could be a State agency.

For the reasons set forth above, we conclude that a corporate instrumentality of a non-Delaware housing authority may not act as a public housing authority within Delaware without meeting the very difficult requirements of Delaware law. Only a housing authority that is created and operates under the exacting strictures of Delaware law may operate as a public housing authority in Delaware.

Feel free to contact us should you have any questions about this matter.

Very truly yours,

Peter S. Feliceangeli
Deputy Attorney General

Approved:

Lawrence W. Lewis
State Solicitor

NEIL ABERCROMBIE
GOVERNOR

DAVID M. LOUIE
ATTORNEY GENERAL

RUSSELL A. SUZUKI
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 586-1500

June 4, 2012

Mr. Hakim Ouansafi
Executive Director
Hawai'i Public Housing Authority
1002 North School Street
Honolulu, Hawaii, 96817

RE: Whether the Hawai'i Public Housing Authority ("HPHA") is the Exclusive Public Housing Agency ("PHA") with Statewide Jurisdiction for the State of Hawai'i

Dear Director Ouansafi:

You have requested our advice whether the Hawai'i Public Housing Authority ("HPHA") is the duly established and exclusive entity designated by statute to act as a Statewide Public Housing Agency (PHA) for the State of Hawai'i. You have conversely asked whether an "out-of-State" PHA may serve as the designated PHA for the State of Hawai'i. You have asked for our advice to these questions because it is required to be submitted with your application for the Section 8 Performance Based Contracts Administration ("PBCA") program pursuant to the "Notice of Funding Availability"("NOFA") issued by the U.S. Department of Housing and Urban Development on or about March 15, 2012. The deadline for your PBCA submission is June 11, 2012

We answer your questions as follows: pursuant to chapter 356D, Hawai'i Revised Statutes ("Haw. Rev. Stat."), HPHA is established as the exclusive Statewide public housing agency to administer, develop and manage low-income public housing projects and programs, including the Section 8 program, on behalf HUD or the State of Hawai'i. Accordingly, an "out-of-State" housing authority could not legally serve or be designated as the exclusive PHA for Hawai'i with Statewide jurisdiction. Chapter 356D, Haw. Rev. Stat., does not allow or authorize out-of State PHA's essentially to cross State lines and perform the duties and powers of the HPHA relating to low-income public housing on behalf of the State of Hawai'i.

The general powers of HPHA are set forth in section 356-4D, Haw. Rev. Stat., and include the power to "make and execute all contracts and instruments necessary and convenient

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to the exercise of its powers." Although section 356D-9, Haw. Rev. Stat., authorizes HPHA to enter into cooperative agreements with other government agencies," this section does not mean that an out-of-State PHA may unilaterally be designated to take control over the statutory duties and powers of HPHA. Clearly, HPHA may consent to cooperative, contractual arrangements with other governmental agencies and PHA's. These cooperative arrangements with other governmental agencies might include, among other things, obtaining the aid and cooperation in "the planning, construction, and operation of public housing projects". Section 356D9-(b)(6), Haw. Rev. Stat. However, there is nothing in chapter 356D, Haw. Rev. Stat. that allows any out-of State PHA to unilaterally undertake or perform the powers of HPHA.

Simply put, HPHA is the exclusive Statewide Public Housing Agency for the State of Hawai'i and no out-of State PHA may presume to take over or succeed to HPHA's statutory powers and duties as established under chapter 356D, Haw. Rev. Stat.

Sincerely,

John C. Wong
Deputy Attorney General

APPROVED:

DAVID M. LOUIE
Attorney General

AG

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

June 11, 2012

Ms. Mary R. Kenney
Executive Director
Illinois Housing Development Authority
401 North Michigan Avenue, Suite 700
Chicago, Illinois 60611

Dear Ms. Kenney:

I have your letter inquiring: (1) whether the Illinois Housing Development Authority (IHDA) constitutes the only in-State public housing agency authorized by Illinois law to operate statewide; and (2) whether, under Illinois law, an instrumentality of an out-of-state public housing agency may act as a public housing agency in Illinois. Because of the nature of your inquiry, I do not believe that the issuance of an official opinion of the Attorney General is appropriate. I will, however, comment informally on the questions you have raised.

BACKGROUND

Based on the information you have provided, on March 23, 2011, the United States Department of Housing and Urban Development, Office of Housing Assistance Contract Administration Oversight (HUD), issued an invitation[1] to receive applications from public housing agencies seeking to administer project-based Section 8 housing assistance payment contracts as performance-based contract administrators (PBC Administrator). The IHDA, in partnership with Quadel Consulting, submitted an application to serve as the PBC Administrator for Illinois, and on July 1, 2011, HUD awarded the position to the IHDA. On August 11, 2011, however, the IHDA received correspondence from HUD stating that it would not proceed with the PBC Administrator process in several states, including Illinois, because protests had been

[1]The invitation was issued pursuant to section 8 of the United States Housing Act of 1937 (the 1937 Act) (42 U.S.C. §1437f *et seq.* (2006 & Supp. IV 2010)) (Section 8). Programs under Section 8 may be "project-based" (rental assistance is attached to a specific building), or "tenant-based" (rental assistance is not project-based, and allows eligible families to select suitable housing and move to other suitable housing). *See* 42 U.S.C. §1437f(f)(6), (7) (2006 & Supp. IV 2010).

filed with the United States Government Accountability Office.[2] Also on August 11, 2011, HUD notified IHDA of its intention to rebid the Illinois PBC Administrator position through a Notice of Funding Availability (NOFA).[3] The NOFA was published on March 9, 2012, and provides, in pertinent part:

> Crossing State Lines. HUD believes that nothing in the 1937 Act prohibits an instrumentality PHA [public housing agency] that is "authorized to engage in or assist in the development or operation of public housing" within the meaning of section 3(b)(6)(A) of the 1937 Act from acting as a PHA in a foreign State. However, *HUD will consider applications from out-of-State applicants only for States for which HUD does not receive an application from a legally qualified in-State applicant. Receipt by HUD of an application from a legally qualified in-State applicant will result in the rejection of any applications that HUD receives from an out-of-State applicant for that state.* (Emphasis added.)[4]

The NOFA also states that in order to serve as a PBC Administrator, an in-State applicant must demonstrate that it: (1) satisfies the definition of a public housing authority set out in section 1437a(b)(6)(A) of the 1937 Act; and (2) has the legal authority to operate throughout the entire State. On March 15, 2012, HUD issued a technical correction to the NOFA, changing the application deadline to June 11, 2012.[5]

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[2]Per your inquiry, protests concerning the selection of the IHDA as PBC Administrator were filed by two entities: National Housing Compliance f/k/a Georgia HAP Administrators, Inc. (a Georgia not-for-profit 501c(4) corporation) and Chicago Housing Consulting, Inc., NFP.

[3]The NOFA was issued pursuant to 42 U.S.C. §3545 (2006 & Supp. IV 2010) and 42 U.S.C. §1437f(c)(8)(A) (2006 & Supp. IV 2010).

[4]*See* Department of Housing and Urban Development, Docket No. FR-5600-N-33, HUD's Fiscal Year (FY) 2012 Notice of Funding Availability (NOFA) for the Performance-Based Contract Administrator (PBCA) Program for the Administration of Project-Based Section 8 Housing Assistance Payments Contracts at 4, *available at* http://portal.hud.gov/hudportal/documents/huddoc?id =2012pbcasec8NOFA.pdf.

[5]*See* Department of Housing and Urban Development, Docket No. FR-5600-N-33-C1, HUD's Fiscal Year (FY) 2011 NOFA for the Performance-Based Contract Administrator (PBCA) Program Technical Correction, *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=PBCA_NOFA_tech_3_15_12.pdf.

ANALYSIS

IHDA as a Public Housing Agency Authorized to Operate Statewide

As a result of HUD's decision to rebid the Illinois PBC Administrator contract, you have inquired whether the IHDA constitutes the only in-State public housing agency authorized by Illinois law to operate statewide. The term "public housing agency" is not defined in Illinois law. Therefore, we will assume that your inquiry relates to the definition of the term "public housing agency" set out in section 1437a(b)(6)(A) of the 1937 Act,[6] which provides:

> the term "public housing agency" means any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of public housing. 42 U.S.C. §1437a(b)(6)(A) (2006 & Supp. IV 2010).

When statutory language is plain and unambiguous, it should be applied as written. *Goodman v. Ward*, 241 Ill. 2d 398, 408 (2011). Under the plain and unambiguous language of section 1437a(b)(6)(A), any "State * * * or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of public housing" constitutes a public housing agency, for purposes of the 1937 Act. It is necessary, therefore, to review the powers and duties of the IHDA to determine whether it possesses the necessary authority to properly be characterized as a "public housing agency."

Illinois Housing Development Act

In 1967, the Illinois General Assembly enacted the Illinois Housing Development Act (the Housing Development Act) (20 ILCS 3805/1 *et seq.* (West 2010)) to address the "serious shortage, of decent, safe, and sanitary housing available at low and moderate rentals to persons and families of low and moderate income" in Illinois. 20 ILCS 3805/3 (West 2010). To assist in addressing this housing shortage, the Housing Development Act established the IHDA as a body politic and corporate (20 ILCS 3805/4 (West 2010)) with the "power to issue notes and

[6]This is the only definition applicable to public housing agencies participating in *project-based* assistance programs under Section 8. A more inclusive definition applies with respect to public housing agencies participating in Section 8 *tenant-based* assistance programs. *See* 42 U.S.C. §1437a(b)(6)(B) (2006 & Supp. IV 2010).

bonds in order to make loans for the acquisition, construction and rehabilitation of housing, community facilities and housing related commercial facilities, acquire and develop land for large-scale planned developments and new communities and, as a means of encouraging home ownership, make loans to and purchase residential mortgages from private lending institutions." 20 ILCS 3805/3 (West 2010).

Further, the General Assembly has delegated significant authority to the IHDA, including the power to: make non-interest bearing advances to not-for-profit corporations for the construction of affordable housing (20 ILCS 3805/7.1 (West 2010)) and make mortgages or other loans to not-for-profit corporations and limited-profit entities for the acquisition, construction, or rehabilitation of housing for low or moderate income persons or families (20 ILCS 3805/7.2 (West 2010)); undertake studies and analyses of the housing needs within the State (20 ILCS 3805/7.3 (West 2010)); encourage research to improve the quality and supply of housing for low and moderate income persons and make interest free grants or loans to facilitate this result (20 ILCS 3805/7.5 (West 2010)); enter into agreements with any Federal, State, or local governmental agency in furtherance of its corporate purposes (20 ILCS 3805/7.11 (West 2010)); borrow money and issue negotiable notes and bonds to fund its statutory endeavors (20 ILCS 3805/7.14 (West 2010)); accept "gifts or grants or loans of funds or property or financial or other aid from any federal or state agency or private fund" (20 ILCS 3805/7.20 (West 2010)); form or consent to the formation of instrumentality corporations pursuant to the General Not For Profit Corporation Act of 1986 (805 ILCS 105/101.01 *et seq.* (West 2010)) or the State Housing Act (310 ILCS 5/1 *et seq.* (West 2010)) and supervise and direct the activities of such instrumentalities (20 ILCS 3805/7.24c (West 2010)); and do anything necessary or convenient to carry out its purposes and exercise the powers it has been granted (20 ILCS 3805/7.25 (West 2010)). Additionally, the Housing Development Act designates the IHDA as the State land development agency (charged with carrying out new community development programs), and State Housing Credit Agency (charged with administering low-income housing tax credits allocated to Illinois under applicable provisions of the Internal Revenue Code of 1986, as amended). 20 ILCS 3805/7.22, 7.24g (West 2010); *see also Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 477 (1988).

This office has previously determined that the IHDA is an "agency or instrumentality of the State" by virtue of its statutory purposes, authority, and duties. *See* Ill. Att'y Gen. Inf. Op. No. I-97-009, issued April 9, 1997. Further, the scope of the Housing Development Act establishes the General Assembly's intent to create a comprehensive statewide program to fund low and moderate income public housing programs throughout Illinois, and to

vest the power and authority to oversee those programs in the IHDA.[7] The Housing Development Act does not limit or restrict the IHDA's authority to act within any area of the State. Consequently, the IHDA constitutes a public housing agency authorized by Illinois law to operate statewide.

Two other Illinois statutes provide for the creation of entities to assist in providing affordable housing for Illinois residents. The State Housing Act (310 ILCS 5/1 *et seq.* (West 2010)) authorizes the formation of "housing corporations" under Illinois law "to acquire, construct, alter, maintain, and operate lands and buildings when authorized by and subject to the supervision of the Illinois Housing Development Authority[.]" 310 ILCS 5/3 (West 2010). Housing corporations may be not-for-profit or limited profit entities, but in all instances "[e]very housing corporation shall remain at all times subject to the supervision and control of the Illinois Housing Development Authority[.]" 310 ILCS 5/3 (West 2010).

Similarly, the Housing Authorities Act (310 ILCS 10/1 *et seq.* (West 2010)) authorizes the governing body of any city, village, or incorporated town with more than 25,000 inhabitants, or of any county, to adopt a resolution establishing the need for a municipal or county housing authority. 310 ILCS 10/3 (West 2010). While housing authorities created under the Housing Authorities Act are municipal corporations (310 ILCS 10/8 (West 2010)) with broad powers to act with respect to the funding and provision of low-income housing, including but not limited to accepting and disbursing Federal funds *(see* 310 ILCS 10/27 (West 2010)), the jurisdiction of these municipal and county authorities is limited to the geographic locations that constitute their respective areas of operation. Accordingly, housing authorities established pursuant to the Housing Authorities Act do not have statutory authority to operate statewide. 310 ILCS 10/3 (West 2010). Based on the foregoing, the IHDA constitutes the only in-State public housing agency authorized by Illinois law to operate statewide.

Instrumentality of an Out-of-State Public Housing Agency as a Public Housing Agency in Illinois

You have also asked whether Illinois law authorizes an instrumentality of a public housing agency of another state to act as a public housing agency in Illinois. A review of pertinent Illinois statutes failed to yield specific reference to an out-of-state public housing

[7]"The IHDA finances the creation and preservation of affordable housing in all the counties of Illinois, in its ultimate objective of providing decent and safe places for people of low or moderate income. IHDA does not own the properties, rent apartments or manage buildings. Rather, IHDA is a financial entity created to help to finance affordable housing * * *. * * * IHDA serves as administrator of state and federal affordable housing financing programs." 20 Ill. Prac., Estate Planning & Admin., §324:2 (4th ed. 2008).

agency acting as a public housing agency in Illinois. Rather, the State Housing Act contemplates the organization and operation of Illinois housing corporations under the provisions of the State Housing Act (310 ILCS 5/3 (West 2010)). Similarly, the Housing Authorities Act specifically authorizes the creation of Illinois municipal corporations to administer that Act's provisions (310 ILCS 10/2 (West 2010)). Neither the State Housing Act nor the Housing Authorities Act authorizes out-of-state agencies or instrumentalities to act as housing corporations or housing authorities in Illinois.

Although the State Housing Act and the Housing Authorities Act do not contemplate an out-of-state agency or instrumentality serving as a public housing agency in Illinois, it might be possible for such an entity to do so pursuant to the provisions of the Intergovernmental Cooperation Act (5 ILCS 220/1 *et seq.* (West 2010)). Under that Act:

> Any power or powers, privileges, functions, or authority exercised or which may be exercised by a public agency of this State may be exercised, combined, transferred, and enjoyed jointly with any other public agency of this State, *and jointly with any public agency of any other state* or of the United States to the extent that laws of such other state or of the United States do not prohibit joint exercise or enjoyment and except where specifically and expressly prohibited by law. (Emphasis added.) 5 ILCS 220/3 (West 2010).

As used in the Intergovernmental Cooperation Act, the term "public agency" refers to "any unit of local government as defined in the Illinois Constitution of 1970, * * * the State of Illinois, any agency of the State government or of the United States, or of any other State, any political subdivision of another State, and any combination of the above pursuant to an intergovernmental agreement which includes provisions for a governing body of the agency created by the agreement." 5 ILCS 220/2(1) (West 2010). Section 5 of the Act (5 ILCS 220/5 (West 2010)), relating to intergovernmental contracts, further provides:

> Any one or more public agencies may contract with any one or more other public agencies to perform any governmental service, activity or undertaking or to combine, transfer, or exercise any powers, functions, privileges, or authority which any of the public agencies entering into the contract is authorized by law to perform, provided that such contract shall be approved by the

governing bodies of each party to the contract and except where specifically and expressly prohibited by law.

The administration of public housing in Illinois constitutes a "governmental service, activity or undertaking" within the meaning of section 5 of the Intergovernmental Cooperation Act. As noted above, while Illinois law clearly authorizes the IHDA to act, statewide, with respect to public housing matters, it does not expressly prohibit out-of-state public agencies from joining together with in-state public agencies, including the IHDA, to accomplish legitimate governmental services, activities, or undertakings. Conceivably, for example, the IHDA could enter into an intergovernmental agreement with an agency of a sister State to administer certain programs in Illinois. For this reason, we are unable to conclude that there are no circumstances under which an out-of-state public housing agency could be authorized to act as a public housing agency within the State.[8]

CONCLUSION

For the reasons stated above, the Illinois Housing Development Authority constitutes the only Illinois public housing agency expressly authorized by Illinois law to operate throughout the State. While Illinois law does not explicitly authorize an instrumentality of an

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[8]Additionally, Federal law may preempt Illinois law with respect to public housing matters. The Supremacy Clause of article VI of the United States Constitution provides that the laws of the United States "shall be the supreme Law of the Land; * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. Since the United States Supreme Court's decision in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819), it has been recognized and settled that any State law found to conflict with Federal law is "without effect." *Funeral Financial Systems, Ltd. v. Metropolitan Life Insurance Company*, 323 Ill. App. 3d 1133, 1136 (2001). Preemption may occur if: (a) the Federal law clearly expresses the intent of Congress to preempt State law; (b) there is no express congressional directive, but preemption may be inferred because there is a direct conflict between Federal and state law; and (c) Federal law creates a pervasive regulatory scheme, allowing a reasonable inference that Congress left no room for supplemental state laws regarding a given topic. *Cipollone v. Ligget Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 2617 (1992). The Illinois Supreme Court has determined that Federal court decisions supply the rule of law for interpreting Federal statutes, and Illinois appellate courts have held that Federal decisions determine the preemptive reach of Federal statutes. Ill. Att'y Gen. Op. No. 96-037, issued December 3, 1996, at 5. There is no evidence, however, that Federal law preempts State law with respect to the authority of out-of-state public housing agencies to administer in-state *project-based* Section 8 programs. Federal law expressly provides that, with regard to *tenant-based* Section 8 programs, "*notwithstanding any provision of State or local law, a public housing agency for another area that contracts with the Secretary [may] administer a program for housing assistance under section 1437f of this title, without regard to any otherwise applicable limitations on its area of operation.*" (Emphasis added.) 42 U.S.C. §1437a(b)(6)(B)(iii)(II) (2006 & Supp. IV 2010). No corresponding Federal provision relates to the administration of *project-based* Section 8 programs.

out-of-state public housing agency to act as a public housing agency in Illinois, the Intergovernmental Cooperation Act does authorize public agencies of the State to partner with the agencies of any other State, or the United States, in order to provide governmental services, activities, or undertakings. Pursuant to the Intergovernmental Cooperation Act, therefore, it is conceivable that an out-of-state public housing agency, acting in consort with a public agency of this State, could be authorized to provide public housing services within the State.

This is not an official opinion of the Attorney General. If we may be of further assistance, please advise.

Very truly yours,

LYNN E. PATTON
Senior Assistant Attorney General
Chief, Public Access and Opinions Division

LEP:KAS:cj

STATE OF INDIANA
OFFICE OF THE ATTORNEY GENERAL
INDIANA GOVERNMENT CENTER SOUTH, FIFTH FLOOR
302 W. WASHINGTON STREET • INDIANAPOLIS, IN 46204-2770
www.AttorneyGeneral.IN.gov

GREG ZOELLER
INDIANA ATTORNEY GENERAL

TELEPHONE: 317.232.6201
FAX: 317.232.7979

June 8, 2012

Privileged and Confidential
Attorney-Client Communication
Advisory Letter No. 12-14

Sherry Seiwert
Executive Director
Indiana Housing and Community Development Authority
30 S. Meridian Street
Suite 1000
Indianapolis, IN 46204

Re: Contract Administrator for Project-Based Section 8 Housing Assistance Payments Contracts

Executive Director Seiwert,

You have requested an opinion as to whether the Indiana Housing and Community Development Authority (IHCDA) is the only housing agency authorized under Indiana law to serve as Contract Administrator for the Project-Based Section 8 Housing Assistance Payments (PBCA) Program in Indiana.

Brief Answer

Yes. IHCDA is the only public housing agency authorized by Indiana law to operate throughout the entire State. In turn, IHCDA is the only public housing agency in the state of Indiana with the requisite authority to carry-out the functions of a PBCA contract administrator.

Analysis

The Project-Based Section 8 Housing Assistance Payments Program was created by the Housing and Community Development Act of 1974 and is administered by the US Department of Housing and Urban Development (HUD). The program offers housing assistance to eligible low-income families. Qualified entities in each state may apply to HUD to assist with the distribution of housing assistance payments in their jurisdiction. These entities are referred to as Contract Administrators for the Project-Based Section 8 Housing Assistance Payments Program.

To serve as contract administrator for the PBCA program an applicant must be a "public housing agency" (PHA) within the meaning of Section 3(b)(6)(A) of Section 8 of the United States Housing Act of 1937, 42 USC §1437f; and must have been "created under a statute that explicitly authorizes the entity to operate throughout the entire State in which the entity proposes to serve as PBCA or that evidences a legislative intent for such entity to have such authority." *See e.g.* Fiscal Year 2012 Notice of Funding Availability for the Performance-Based Contract Administrator Program for the Administration of Project-Based Section 8 Housing Assistance Payment Contracts, Docket No. FR 5600-N-33 (NOFA), p.10. For the purposes of the PBCA program a "public housing agency" is defined as "any State, county, municipality, or other governmental entity or public body, or agency or instrumentality of these entities, that is authorized to engage or assist in the development or operation of low-income housing..." *See* 24 C.F.R. 5.100. A PHA is established by state law and its "authority and power to act derive from the State law(s) under which it was created." NOFA, p. 5. As mentioned above, the responsibilities of a contract administrator require the selected PHA have the statutory authority to operate state-wide. In turn, determining which entity or entities are eligible to act as contract administrator in a given state depends on examining the governing laws of that state. In some states multiple state, local, private and even foreign PHA's may be qualified under state law, while in other states the pool of qualified entities may be smaller.

In Indiana, the IHCDA is the only public housing agency qualified under state law to serve as contract administrator for the PBCA program because IHCDA is the only PHA authorized to act throughout the entire state. IHCDA was created by IC 5-20-1-3 as a "public body corporate and politic of the *state of Indiana*," vested with powers necessary to address the state of Indiana's "need for safe and sanitary residential housing within the financial means of low and moderate income persons and families." Membership of the authority is composed of the state treasurer, the lieutenant governor, the public finance director of Indiana's finance authority and four appointees of the governor. All of these members hold state-level office or are otherwise appointed or designated by an individual holding a state-level office. The authority is allowed under the statute "to maintain an office in the city of Indianapolis and at such other place or places as it may determine." IC 5-20-1-4(a)(19). Each of these provisions supports the notion that IHCDA is an entity vested with state-wide jurisdiction, created for purpose of addressing state-wide housing needs. The same is not true of other public housing authorities in the state, which take their power from local units of government under Title 36 of the Indiana Code.

Under Ind. Code 36-7-18-4, a local "unit" (other than a township) can create a public housing authority if there is a need for such an agency "in the unit." "Unit" is defined as a "county,

municipality or township," but townships are excluded from creating a PHA by 36-7-18-4(a). A PHA created by a municipality may only operate inside the municipality or within a five mile radius. Ind. Code 36-7-18-41(a). Likewise a county housing authority may only operate within the boundaries of the county. Ind. Code 36-7-18-41(b). By limiting their jurisdiction, these provisions exclude a PHA created under Ind. Code 36-7-18-4 from serving as contract administrator for the PBCA program.

Conclusion

To serve as Contract Administrators for the Project-Based Section 8 Housing Assistance Payments Program, an entity must be a public housing agency and must be authorized by statute to operate throughout the entire state for which it intends to serve as administrator. Ind. Code 36-7-18-41 expressly limits the jurisdiction of county and municipal public housing authorities to the local unit that created them. IHCDA is a "public body corporate and politic *of the state of Indiana*," and is implicitly authorized by the provisions of Ind. Code 5-20-1 to operate throughout the state. In turn, IHCDA is the only housing agency in the state of Indiana with the requisite statutory authority to serve as contract administrator for the PBCA program.

Thank you for your inquiry.

Sincerely,

Matthew Light
Chief Counsel – Advisory & ADR
Services Division

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

JACK CONWAY
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

October 13, 2011

Karen Quinn, Esq.
Deputy General Counsel
Kentucky Housing Corporation
1231 Louisville Road
Frankfort, Kentucky 40601-6191

Re: Project-based Section 8 rental assistance contracts

Dear Ms. Quinn:

Although this letter is not a formal opinion of this office, we hope the views expressed will be of some assistance. You have asked whether the Kentucky Housing Corporation (KHC) is the only agency with authority under Kentucky law to administer project-based Section 8 rental assistance contracts with the United States Department of Housing and Urban Development (HUD) in Kentucky. We believe that it is.

The project-based Section 8 rental assistance program, created by the Housing and Community Development Act of 1974, enables HUD or its contract administrator to enter into contracts with property owners to subsidize housing units in specific apartment complexes for those in financial need. The KHC has served as contract administrator for Kentucky since September 1, 2000, overseeing over 22,799 units in 379 properties statewide.[1] The property owners must establish appropriate tenant selection policies for the units, based on area median income, and take applications for rental assistance. The contract administrator must ensure that all parties adhere to the requirements of the program. The KHC, in its capacity as contract administrator, conducts annual on-site visits to

[1] http://www.kyhousing.org/full.aspx?id=3930, retrieved October 13, 2011.

the properties, performs monthly desk reviews, adjusts rents and reviews utility allowances, and provides advice and assistance to tenants and property owners.[2]

The KHC is charged by KRS 198A.035(1) with overseeing the development and implementation of Kentucky's statewide housing policy. The state housing policy is mandated by KRS 198A.025 in order to "[e]ncourage the availability of decent and affordable housing for all Kentucky residents," to "[i]dentify the basic housing needs of all Kentuckians," to "[c]oordinate housing activities and services among state departments and agencies," to "[e]ncourage and strengthen collaborative planning and partnerships among social service providers, all levels of government, and the public and private sectors, including for-profit and nonprofit organization, in the production of affordable housing," to "[c]oordinate housing into comprehensive community and economic development strategies at the state and local levels," and to "[d]iscourage housing policies or strategies which concentrate affordable housing in limited sections of metropolitan areas and county jurisdiction."

In fulfilling its statutory purposes, the KHC has the power "to enter into agreements or other transactions with any federal, state, or local governmental agency for the purpose of providing adequate living quarters for [lower- and moderate-income] persons and families in cities and counties where a need has been found for such housing and where no local housing authorities or other organizations exist to fill such need." KRS 198A.040(10). It also has the power "[t]o provide technical and advisory services to sponsors of residential housing and to residents and potential residents thereof," "[t]o promote research and development in scientific methods of constructing low cost residential housing of high durability," and "[t]o encourage community organizations to participate in residential housing development." KRS 198A.040(13)-(15). Furthermore, KRS 198A.040(16) gives the KHC the power "[t]o make, execute, and effectuate any and all agreements or other documents with any governmental agency or any person, corporation, association, partnership, or other organization or entity, necessary to accomplish the purposes of this chapter." As mentioned above, the purposes of Chapter 198A include requiring the KHC to implement the comprehensive statewide housing policy.

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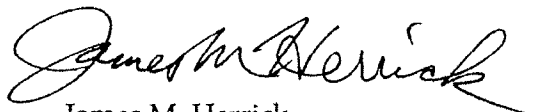
[2] http://www.kyhousing.org/page.aspx?id=657, retrieved October 11, 2011.

Where a comprehensive scheme established by statute places the regulation of a subject under the jurisdiction of a particular agency, regulation of that subject by other entities is preempted. OAG 11-003. The KHC's duty to develop and implement a comprehensive state housing policy presupposes the ability to assess financial conditions and coordinate housing assistance throughout the Commonwealth. Since the administration of project-based rental assistance contracts in multiple Kentucky locations invokes the same need for comprehensive and coherent statewide oversight contemplated by the legislature for the KHC, we believe that the General Assembly would not have intended for any other entity to fulfill this function.

As a matter of state law, therefore, this office is aware of no entity, public or private, other than the KHC, which has been given statutory authority to conduct such an activity as administering project-based rental assistance contracts for a federal agency in the Commonwealth of Kentucky. If you have any questions, you may call this office at (502) 696-5622.

Yours very truly,

JACK CONWAY
ATTORNEY GENERAL



James M. Herrick
Assistant Attorney General

#350

DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

FACSIMILE NO.
(410) 576-7036

WRITER'S DIRECT DIAL NO.
(410) 576-6327
asnyder@oag.state.md.us

May 31, 2012

Raymond Skinner, Secretary
Maryland Department of Housing and Community Development
100 Community Place
Crownsville, Maryland 21032

Re: Public Housing Authorities in Maryland

Dear Secretary Skinner:

You have asked for our opinion as to whether an out-of-state public housing agency, or an instrumentally thereof, may operate as a public housing agency in Maryland. More specifically, you have presented the following facts and question: A state or local government outside of Maryland creates a legal entity to act as an instrumentality of that government. In the state where the legal entity is created, it has authority to act as a "public housing agency," as that term is defined by the United States Housing Act of 1937. *See* 42 U.S.C. § 1437a(b)(6)(A). The legal entity has also registered or qualified to conduct business in Maryland. *See* Md. Code Ann., Corps. & Assns. §§ 7-202, 7-203. Does Maryland law authorize the out-of-state public housing agency or its legal instrumentality to act as a "public housing agency" within Maryland?

In our opinion, an out-of-state public housing agency or its legal instrumentality may not operate as a public housing agency within Maryland. The administration of public housing programs within Maryland constitutes an essential governmental function that only the Department of Housing and Community Development ("DHCD"), established under Division I of the Housing and Community Development Article of the Maryland Annotated Code (the "Housing Act"), and "public housing authorities" ("PHAs") established under Division II of the

Housing Act, may perform.[1] An out-of-state public housing agency or its instrumentality, regardless of whether the instrumentality was properly formed under the general corporate laws of Maryland or another state, cannot qualify as a public housing authority under Maryland law.

We also address a second question that, although not specifically asked in your request for our opinion, relates to the requirements of federal law, namely, whether DHCD and PHAs authorized to act as "public housing agencies" within Maryland may exercise their authority on a statewide basis, as opposed to being limited to certain political subdivisions of the State. On this point, we conclude that only DHCD and PHAs created by Baltimore City or a Maryland municipality are empowered to act as "public housing agencies" on a statewide basis throughout Maryland. A PHA established by a Maryland county may administer rent subsidy payments and housing assistance programs only within its county.

I

Background

This request arises out of the U.S. Department of Housing and Urban Development ("HUD") 2011 solicitation of applications from entities wishing to serve as the administrator of the federal Section 8[2] project-based housing assistance program (the "Program") for one or more of the states, including Maryland. *See* Invitation of Submission of Applications: Contract Administrators for Project Based Section 8 Housing Assistance Payments ("HAP") Contracts (March 23, 2011) (available at http://portal.hud.gov/hudportal/documents/huddoc?id=invitationforappsfinal.pdf) (last visited on May 23, 2012) (the "Solicitation"). The entities selected by HUD to administer the Program within the states are referred to as "Performance Based Contract Administrators" or "PBCAs." A PBCA disburses federal funds allocated for rental assistance to low income residents at approved housing projects. In order to fund the administration of the Program, the PBCA retains a percentage—agreed upon by the PBCA and HUD—of the federal funds it disburses. Under the terms of the Solicitation, the PBCA would serve for a term of three years.

In order to be eligible to administer the Program, an entity must qualify as a "public housing agency," which is defined under federal law as "any State, county, municipality or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of public housing." 42 U.S.C. §

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[1] We caution the reader not to confuse the terms "public housing *agency*," which is a federal statutory term that relates to eligibility to administer the Section 8 program generally, and "public housing *authority*," which is a Maryland statutory term that relates to the authority to administer federal rental assistance programs within Maryland.

[2] "Section 8" refers to § 8 of the Housing Act of 1937, 42 U.S.C. § 1437f, but generally refers to a number of statutory provisions, 42 U.S.C. §§ 1437a, 1437c, 1437f, 3535(d), 12701, and 13611-19, and the regulations promulgated thereunder at 24 C.F.R. §§ 880-888.

1437a(b)(6)(A). Traditionally, the applicant pool for qualification as a PBCA was dominated by state housing agencies, like DHCD, that have state-law authority over housing-related matters within their own state. DHCD has served as the PBCA for Maryland continuously since 2000.

In response to the Solicitation, however, certain "out-of-state" public housing agencies or their legal instrumentalities applied to administer the Program in states other than the states in which they were formed. HUD acknowledged this type of applicant in the Solicitation, and required an applicant who proposed to serve as a PBCA in a state other than the state of its organization to provide a "supplemental letter" from an attorney containing a "reasoned (i.e. non-conclusory) analysis establishing that the laws of the State in which the applicant proposes to serve as PBCA do not prohibit the applicant from acting as a [public housing agency] throughout the entire State." Solicitation, Sections 2.1 and 2.6. The Solicitation also required that the supplemental letter contain "a clear statement that such laws neither explicitly nor implicitly prohibit the applicant from acting as a [public housing agency] throughout the entire State." *Id.*

In 2011, DHCD submitted a bid in response to the Solicitation, but was not selected as the PBCA for Maryland. Instead, HUD selected Summit Multi-Family Housing Corporation—a non-profit instrumentality of the Akron (Ohio) Metropolitan Housing Authority—to serve as the PBCA for Maryland. It is our understanding that out-of-state entities were selected to serve as PBCAs in several other states as well.

DHCD, along with numerous other state housing agencies involved in the Solicitation, filed protests to the awards on several different grounds, including that awards were made to out-of-state instrumentalities. In response, HUD cancelled the disputed awards and issued a Notice of Funding Availability on February 29, 2012, re-opening the application process for the PBCAs in certain states, including Maryland. *See* HUD's Fiscal Year (FY) 2012 Notice of Funding Availability (NOFA) for the Performance-Based Contract Administrator (PBCA) Program for the Administration of Project-Based Section 8 Housing Assistance Payments Contracts (available at http://portal.hud.gov/hudportal/documents/huddoc?id=pbcanofafinal.pdf) (last visited May 23, 2012) ("NOFA"). HUD stated in the NOFA that it would "consider applications from out-of-State applicants only for States for which HUD does not receive an application from a legally qualified in-State applicant." NOFA § D.

HUD included within the NOFA separate eligibility provisions for in-state applicants (*i.e.*, a governmental entity, or instrumentality thereof, "formed under the laws of the same State for which it proposes to serve as a PBCA," NOFA § E.1) and out-of-state applicants (*i.e.*, an instrumentality "formed under the laws of a State other than the State for which it proposes to serve as a PBCA," NOFA § E.2).[3] Under these eligibility provisions, in-state applicants must

[3] According to HUD, out-of-state applicants typically consist of an instrumentality of an out-of-state public housing agency because the governmental entities themselves "are typically limited in their area of operation under the law of the State of their creation to the locality or to the State that they were

demonstrate that they have "the legal authority to operate throughout the entire State." NOFA § E.1. An out-of-state applicant, by contrast, must demonstrate that it "has the legal authority, both under the law of the State of its creation and under the law of the State for which it is applying to act as PBCA, to operate throughout the entire State for which is applying." NOFA § E.2. *All* applicants must demonstrate that they satisfy the definition of "public housing agency" set forth in the federal housing act.

HUD has subsequently indicated that, in evaluating whether an out-of-state entity has the authority to operate as a public housing agency in the state for which it is applying, it will consider the opinion of the Attorney General of the applied-for state and that, "[t]o the extent that the Attorney General's opinion is on-point and has considered all the relevant facts about any potential in-state applicants (e.g., instrumentalities), HUD will rely on a state's Attorney General's opinion." NOFA for PBCAs and ACC for NOFA Q&A (update as of 05/11/2012), Response to Question No. 163 (available at http://portal.hud.gov/hudportal/documents/huddoc?id=pbcanofaaccqandasumm.pdf) (last visited May 22, 2012) ("NOFA Q&A"). You have asked for this opinion in anticipation of HUD's reliance on the same.

II

Analysis

A. Whether an Out-of-State Public Housing Agency or its Instrumentality May Serve as a Public Housing Authority in Maryland

An out-of-state public entity may not serve as a public housing authority in Maryland even if it has registered to do business in Maryland and is authorized by its state of origin "to engage in or assist in the development or operation of public housing," as allowed under federal law, 42 U.S.C. § 1437a(b)(6)(A). As set forth below, only DHCD or a PHA created by a Maryland political subdivision may administer federal rental assistance programs within Maryland. This conclusion flows from the Housing Act, which establishes a comprehensive legal framework for the administration of public housing in Maryland.

The Housing Act is the result of the merger of two previously existing statutes. Article 44A of the Maryland Annotated Code (the "Housing Authorities Act") was enacted in 1937 "in anticipation of, and in order to take advantage of, the provisions of the United States Housing Act of 1937. . . ." *Jackson v. Housing Opportunities Commission of Montgomery County*, 289 Md. 118, 121 (1980); *see also* 1937 Md. Laws, ch. 517. The Housing Authorities Act established a housing authority in each city having a population of more than 1,000 and in each Maryland county. *Id.* Each authority was deemed "a public body corporate and politic" and given "all the powers necessary or convenient to carry out and [effectuate] the purposes and

established to serve." NOFA § E.2. Because the conclusions reached in this opinion apply equally to out-of-state governmental agencies and the instrumentalities they may form, we will use the term "out-of-state entity" to refer to both entities.

provisions of [the Act]. . . ." *Id.*, 121-22; *see also Brooks v. Housing Authority of Baltimore City*, 411 Md. 603, 618 (2009).

The second of the merged statutes was enacted in 1970, when, finding that "a need exists to coordinate and concentrate federal, state, regional and local public and private community development efforts and resources," the Maryland General Assembly created the Community Development Administration ("CDA") as a division within the newly-created Maryland Department of Economic and Community Development ("DECD")—a "principal department of the State Government" and the predecessor to the present-day DHCD. CDA was tasked with, among other things, the responsibility to oversee the administration of community assistance programs in Maryland. 1970 Md. Laws, ch. 527 at 1241–48. Maryland State government was reorganized in 1987, at which time DECD was abolished, and CDA and its functions were transferred, along with other housing and community development programs, to the then newly-created DHCD. 1987 Md. Laws, ch. 311. The statutory provisions relating to DHCD were later re-codified as Division I of the Housing Act in 2005, 2005 Md. Laws, ch. 26, with the Housing Authorities Act re-codified as Division II of the Housing Act the next year. 2006 Md. Laws, ch. 63; *see Mitchell v. Housing Authority of Baltimore City*, 200 Md. App. 176, 187 (2011). Thus, the Housing Act now contains two divisions: Division I, Housing and Community Programs, which provides for the establishment, powers, and duties of DHCD, Md. Code Ann., Hous. & Comm. Dev. §§ 1-101–11-106[4]; and Division II, Housing Authorities, which provides for the establishment, powers and duties of PHAs, §§ 12-101–23-101.

Division I: Maryland Department of Housing and Community Development

Division I gives DHCD broad authority to engage or assist in the development or operation of housing, including public housing, in Maryland. As a "principal department of State government," the Department has the authority to operate and exercise the authority of the State throughout Maryland. *See* § 2-101; Md. Code Ann., State Gov't § 8-201 (enumerating the principal departments of State government); *see also* §§ 2-102(1), 2-102(5), 2-102(8) (requiring DHCD to assist "political subdivisions" throughout the State) *and* § 4-211(a)(1) (requiring DHCD to "assist the Governor in coordinating the activities of governmental units of the State that affect the solution of community development problems and the implementation of community plans"). DHCD is responsible for working with political subdivisions to develop solutions to common problems, serves as a clearinghouse for information and materials on sound community assistance, provides consultative, training and education services to political subdivisions and local public agencies, and accepts gifts, grants, contributions or loans of money. *See generally* § 2-102.

DHCD has the statutory authority to "administer federal programs" relating to community assistance in Maryland, §§ 2-102(9) and 1-101(b), and, through its Community

[4] All statutory references refer to the Housing and Community Development Article of the Annotated Code of Maryland, unless otherwise provided.

Development Administration, has a broad range of other powers related to affordable housing, including the authority to "do all things necessary to qualify for assistance . . . as a public housing agency under a federal housing program." § 4-211(8). These statutorily conferred powers qualify DHCD as a public housing agency within the meaning of 42 U.S.C. § 1437a(b)(6)(A), and confer on DHCD the authority to operate and act as a public housing agency throughout the entire State. DHCD has served as the PBCA for Maryland since 2000 and at no point has HUD or any party questioned DHCD's qualifications to serve as a PBCA by virtue of its status as a public housing agency capable of acting throughout Maryland.

Division II: Local Public Housing Authorities

Division II of the Housing Act relates to public housing authorities established at the local level. Like Division I, Division II was established to further the "public interest," § 12-102(9), based on findings of the Maryland legislature that there is a "shortage of safe or sanitary housing that is available at rents that individuals of low and moderate income can afford," § 12-102(2), and a public need to eliminate unsafe, unsanitary, and overcrowded living conditions in Maryland. *See generally* § 12-102. Division II provides for the establishment of a PHA for each "county or municipal corporation of the State" and gives each PHA the authority to "do all that is necessary or desirable to secure the financial aid or cooperation of political subdivisions, State government or federal government to help the authority to undertake, construct, maintain or operate a housing project." § 12-103. It provides for the establishment of two types of public housing authorities: "code authorities," which are defined to mean "an authority activated on or after July 1, 1990," § 12-101(f), and "pre-existing authorities," which are those authorities "activated before July 1, 1990." § 12-101(r). Each PHA—whether code or pre-existing—is a "public body corporate and politic" that "exercises public and essential governmental functions." § 12-501(1).

Although the Housing Act "enabl[es]" a "political subdivision to authorize an authority to operate," § 12-202, a Maryland political subdivision must "breathe life into each otherwise dormant agency by declaring the need for a housing authority to function in their city or county." *Jackson*, 289 Md. at 121; *see also Housing Authority of College Park v. Macro Housing, Inc.*, 275 Md. 281, 282 n.1 (1975). In addition to declaring the need for a local housing authority, a Maryland political subdivision "breathe[s] life" into an authority by approving the formation of the authority, appointing its commissioners, and overseeing the finances of the PHA. A code authority (*i.e.*, an authority created after July 1, 1990) "may not do business or exercise its powers unless . . . its articles of organization have been recommended in writing by the chief elected official, adopted by a resolution or ordinance of the legislative body, and filed with the Secretary of State," who must then "issue[] a certificate of organization to the code authority." § 12-203.[5] The chief elected official also must "appoint the required number of commissioners

[5] A pre-existing authority may continue to operate without having a local government adopt articles of organization, but only if it was "activated" by the local government subdivision prior to July 1, 1990. § 12-101(r). Although the term "activated" is not defined by statute, we interpret it consistently

of the authority," whether the authority is a code authority or a pre-existing authority. § 12-302(a).

The "chief elected official" and "legislative body" that must approve the creation of the authority and appoint its commissioners are officials of the "political subdivision." § 12-101(e), (*l*). Although out-of-state public housing agencies or their instrumentalities may also have been created by political subdivisions, the term "political subdivision" in the Housing Act is defined as a "county or municipal corporation *of the State*." § 12-101(q) (emphasis added). Case law and common sense confirm that the phrase "of the State" conveys the meaning that the county or municipality be "locat[ed] . . . within State borders." *Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.*, 330 Md. 758, 786 (1993). Accordingly, an out-of-state public housing agency or its instrumentality formed to serve as a PBCA would not qualify under Maryland law as a public housing authority, and therefore would not be capable of serving as a PBCA in Maryland.

This conclusion is consistent with other statutory provisions and court decisions confirming that housing authorities in Maryland carry out "essential governmental functions" and are treated as governmental entities for a number of purposes. Section 12-501 establishes the principle that a housing authority within Maryland "is a public body corporate and politic that exercises public and essential governmental functions." § 12-501(a) (internal enumeration omitted); *Mayor and City Council of Baltimore v. Baltimore Gas & Electric Co.*, 232 Md. 123, 131 (1963) (same); *see also Gibson v. Housing Auth. of Baltimore City*, 142 Md. App. 121, 128, *cert. denied*, 369 Md. 182; *vacated on other grounds sub nom Housing Auth. of Baltimore City v. Smalls*, 369 Md. 224 (2002); *Brooks*, 411 Md. at 611 n.3 (describing *Gibson*). PHAs in Maryland are specifically included within the definition of "local government" for purposes of the application of the Local Government Tort Claims Act ("LGTCA"), *see* Md. Code Ann., Crts. & Jud. Pro. § 5-301(d)(15), and are exempt from State taxes and assessments. *Id.* § 12-104(b)(2); *see also* 55 *Opinions of the Attorney General* 391 (1970) (concluding that housing authority is exempt from recordation tax on the same grounds as a "political subdivision," based on the determination that the decision to the contrary in *Pittman v. Housing Auth.*, 180 Md. 457 (1942), had been legislatively overridden by 1945 Md. Laws, ch. 253). While the Court of Appeals has yet to decide whether the operation of a housing project, as opposed to its construction, qualifies as a governmental activity for purposes of immunity under the LGTCA, *see Jackson*, 289 Md. at 120 n.2, "[i]t has been generally held that housing projects are governmental." *Mayor and City Council*, 232 Md. at 132.[6]

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with *Jackson* to mean that the local political subdivision must "breathe life" into the authority by "declaring the need for a housing authority to function in their city or county." *Jackson*, 289 Md. at 121.

[6] This is not to say that an out-of-state instrumentality, duly organized under the laws of its state, cannot be involved in housing development projects in Maryland. For example, a nonprofit housing corporation formed under the laws of another state and registered to do business here in Maryland may be able to develop and operate low-income housing projects and, if carried out effectively and exclusively for a charitable purpose, may qualify for certain property tax exemptions under § 7-202 of the Tax-

It is a standard legal principle that a government entity is a creature of statute and has only that authority expressly granted, or reasonably implied, by the governing statute. *Frederick County v. Page*, 163 Md. 619, 631 (1932); *Birge v. Town of Easton*, 274 Md. 635, 639 (1974). No Maryland statute authorizes another state's agency, or an instrumentality thereof, to perform governmental functions with respect to public housing in Maryland. Rather, the Maryland Legislature has carefully established a state-wide approach to the public housing pursuant to which DHCD functions as the State's housing finance agency with broad authority pursuant to Division I of the Housing Act, and Maryland counties and municipalities are empowered to create public housing authorities pursuant to Division II of the Housing Act to, among other things, "administer rent subsidy payments and housing assistance programs for both eligible landlords and tenants." § 12-105(a)(2)(i), (b)(1)(i). The statutory scheme is expressly based on the Legislature's "concern" that "many residents of the State are living in substandard housing," § 3-202, and the declaration that housing authorities "exercise[] public and essential governmental functions" when addressing that concern. § 12-501(1). This comprehensive approach leaves no room for out-of-state public housing agencies or their instrumentalities to exercise the governmental functions the Maryland Legislature has chosen to entrust to DHCD and Maryland public housing authorities. In sum, Maryland law does not authorize an out-of-state public housing agency or its legal instrumentality to act as a "public housing agency" within Maryland.[7]

Property Article. *See Supervisor of Assessments of Baltimore City v. Har Sinai West Corp.*, 95 Md. App. 631 (1993). A nonprofit housing corporation may also "provide[] safe and sanitary housing to persons of eligible income in such a way that the corporation works essentially *like* an authority,"§ 12-104(b)(1) (emphasis added), which would entitle the nonprofit housing corporation to a further tax exemption. § 12-104(b)(2)(i). However, nothing in the Housing Act authorizes such nonprofit housing corporations —whether in-state or out-of-state—to administer governmental subsidy programs, as it does with respect to DHCD and PHAs created by Maryland subdivisions. And because DHCD and PHAs in Maryland are government-created, subject to executive oversight, and essentially governmental in nature, the full faith and credit clause of the U.S. Constitution does not come into play. *See, e.g., Nevada v. Hall*, 440 U.S. 410, 422-23 (1979) (concluding that "the full faith and credit clause does not "override the constitutional authority" of the state to legislate on matters "appropriately the concern of the state").

[7] This conclusion necessarily rests on an evaluation of current law, which is unlikely to change prior to the June 11, 2012 deadline for submitting applications in response to the NOFA. Maryland's regularly scheduled 2012 legislative session ended on April 9, 2012, and a special session, devoted to certain budgetary refinements, concluded on May 16, 2012. Although media outlets have widely reported that a second special session will be convened in July, 2012, such a session has not been scheduled and, it is reported, would be focused on expanding slot machine gambling within Maryland. There is no reason to believe that the General Assembly will use a second special session, if held, to take up the criteria for qualifying as a public housing authority in Maryland.

B. Whether DHCD is the Only PHA Authorized to Administer the Section 8 Program Throughout the State

The second question we address—whether DHCD is the only entity that is authorized to serve as the PBCA for the Section 8 program throughout Maryland—is presented by the NOFA. NOFA § E.1. The answer to this question is dictated by statute. Section 12-105 establishes the areas of operation for PHAs in Maryland. The area of operation varies by the level of government which creates the PHA and with the type of activity the PHA is conducting.

A PHA created by Baltimore City or a municipal corporation (hereinafter, a "municipally-created PHA")[8] has the authority to "operate within its territorial boundaries" and, "*without regard to location* . . . administer rent subsidy payments and housing assistance programs," own or manage pre-1990 housing projects, and "develop, own, or operate" a housing project within another political subdivision. § 12-105(a) (emphasis added). This provision enables a municipally-created PHA to perform any function of a PHA within the boundaries of the municipality that creates it, and act throughout the State to, among other things, "administer rent subsidy payments and housing assistance programs." *Id.* (emphasis added). Accordingly, a municipally-created PHA is eligible to serve as the PBCA and administer the Program throughout Maryland.

The same does not hold true for a PHA established by a Maryland county, which may only administer rent subsidy payments and housing assistance programs "[a]nywhere in its county." § 12-105(b)(1). Accordingly, a county-created PHA would be able to administer the Program within the boundaries of the county that created it, but it cannot serve as the PBCA throughout Maryland.[9]

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[8] Under Maryland law, Baltimore City is governed by Article XI-A of the Constitution, which is the same constitutional provision that applies to charter counties, rather than Article XI-E, which applies to municipal corporations. *See* 94 *Opinions of the Attorney General* 161, 168 n.13 (2009); *Pressman v. D'Alesandro*, 211 Md. 50, 57 (1956). The Housing Act, however, includes Baltimore City within its provisions relating to both municipal corporations and counties. *Compare* § 12-105(a) (setting forth provisions relating the "authority of a municipal corporation or Baltimore City") *with* § 12-101(g) (defining "county" to mean "a county of the State or Baltimore City"). Given that the Housing Act gives a Baltimore City housing authority the same powers it gives to authorities created by municipal corporations, we consider a PHA created by Baltimore City to be a municipally-created PHA for purposes of this Opinion.

[9] In addition to the general provisions establishing and granting specific powers to local PHAs in §§ 12-101 through 12-705, Division II of the Housing Act provides jurisdiction-specific provisions relating to the PHAs within individual political subdivisions. *See, e.g.*, §§ 13-101–13-111 (City of Annapolis); §§ 14-101–14-103 (Anne Arundel County). In enacting each of these jurisdiction-specific provisions, the Legislature preserved the applicability of the general provisions of Title 12 to the jurisdiction at issue, "except where it is inconsistent with this title." *See, e.g.*, §§ 13-102, 14-101, 15-102.

III

Conclusion

In our opinion, neither an out-of-state public housing agency nor its legal instrumentality may operate as a public housing agency within Maryland. The administration of public housing programs within Maryland constitutes an essential governmental function that only DHCD and public housing authorities established under Division II of the Housing Act may perform. An out-of-state public housing agency or its instrumentality, regardless of whether the instrumentality was properly formed under the general corporate laws of Maryland or another state, cannot qualify as a public housing authority under Maryland law. With respect to in-state entities, only DHCD and municipally-created PHAs are empowered to administer public housing programs on a statewide basis throughout Maryland. A PHA established by a Maryland county may only administer rent subsidy payments and housing assistance programs in its county.

Sincerely,

Douglas F. Gansler
Attorney General

Anthony J. Mohan
Assistant Attorney General

Adam D. Snyder
Chief Counsel
Opinions & Advice

None of the jurisdiction-specific provisions is inconsistent with the requirements of § 12-105 relating to the scope of operations of municipal and county PHAs.

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. Box 30754
LANSING, MICHIGAN 48909

BILL SCHUETTE
ATTORNEY GENERAL

May 24, 2012

Mr. Gary Heidel
Executive Director
Michigan State Housing Development Authority
735 East Michigan Avenue
Lansing, MI 48912

Re: HUD Statewide Authority

Dear Mr. Heidel:

As requested by you in connection with the proposed Notice of Funding Availability for project-based Section 8 contract administration (Docket No. FR 5600-N-33) posted by the U.S. Department of Housing and Urban Development ("HUD"), we have provided to you a letter containing certain opinions of the Finance Division of the Michigan Department of Attorney General dated May 23, 2012. Following is a summary of the questions we addressed, and of the conclusions we reached:

1. Does a city, village, township or county housing commission formed under the Housing Facilities Act of 1933 (18 PA 1933; MCL 125.651, et seq) (the "Local Act") or an instrumentality of that housing commission have the explicit authority to administer a federal housing program outside its territorial boundaries and throughout the entire state of Michigan?

2. If explicit authority is lacking, does a local housing commission or its instrumentality have the implied authority to do so?

3. Does a corporation formed under the laws of this state by an out-of-state public housing agency have the authority to act as a public housing agency within the state of Michigan?

Our answer to all three questions was "No", based on four conclusions that we reached after analyzing Michigan statutes and applicable case law:

First, municipal corporations cannot exercise powers beyond their territorial limits unless the power to do so is expressly or impliedly (such as a case of public necessity) authorized by statute, and that the Michigan case law supporting this conclusion can logically be applied analogously to determine the powers of a housing commission formed by a municipal corporation under the Local Act, as well as an instrumentality of the housing commission.

Second, there is no sound argument that explicit or implied authority exists, or that it is necessary or at least manifestly desirable for a municipal corporation or its instrumentality, i.e., a local housing commission, to contract to provide these services outside the limits of the municipality.

Third, in light of the State Housing Development Authority Act of 1966 (346 PA 1966; MCL 125.1401, et seq) (the "State Act") for the creation of a state-wide housing authority, the laws of statutory construction applicable to conflicting or overlapping areas of law would seemingly prohibit a local housing commission incorporated under the Act (or instrumentality thereof) from operating throughout the entire state of Michigan.

Fourth, neither the state nor federal law intended that governmentally-created public housing agencies or their instrumentalities would have the power to act as public housing agencies in any other jurisdiction for purposes of the project-based Section 8 subsidy program. Such an intention would need to be clearly expressed.

We concluded that, because the Michigan legislature has clearly chosen to create a state-wide housing authority to carry out state-wide programs relating to housing, and because of the limitations on municipal corporations and their subsidiaries and instrumentalities to act outside of their own borders, especially in light of the substantial overlap between the State Act and the Local Act, no local government or instrumentality of that local government has the authority to implement programs of housing assistance throughout the State of Michigan. We reached the same conclusion with respect to any out-of-state governmental entity. While the purpose of our communication to you was not to opine as to federal law, we concluded that no such authority has been granted or intended by Congress or Michigan's legislature. In fact, the State Act advances the legislature's intent for housing programs to be addressed by a state authority that possesses unique knowledge of the housing landscape within the State of Michigan.

As stated in our letter and herein, this is division-level advice of the Finance Division of the Michigan Department of Attorney General, and is not a formal opinion of the Attorney General.

Sincerely,

Ronald H. Farnum
First Assistant Attorney General

Jarrod T. Smith
Assistant Attorney General

Finance Division
517-373-1130

RHF:JTS/sh
Enc.
cc: Molly Jason

2012-0013081-A/MSHDA HUD Memo Statewide Authority 2012/Heidel Cover Letter

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. Box 30754
Lansing, Michigan 48909

BILL SCHUETTE
ATTORNEY GENERAL

May 23, 2012

Mr. Gary Heidel
Executive Director
Michigan State Housing Development Authority
735 East Michigan Avenue
Lansing, MI 48912

Re: HUD Statewide Authority

Dear Mr. Heidel:

In connection with the proposed Notice of Funding Availability for project-based Section 8 contract administration (Docket No. FR 5600-N-33), posted by the U.S. Department of Housing and Urban Development ("HUD"), you have asked whether a city, village, township or county housing commission formed under the Housing Facilities Act of 1933 (18 PA 1933; MCL 125.651, et seq) (the "Local Act") or an instrumentality of that housing commission has the explicit authority to administer a federal housing program outside its territorial boundaries and throughout the entire state of Michigan. Second, you have asked, if explicit authority is lacking, does a local housing commission or its instrumentality have the implied authority to do so? Third, you have asked whether a corporation formed under the laws of this state by an out-of-state public housing agency has the authority to act as a public housing agency within the state of Michigan.

Our answer to all three questions is "No."

Our answer is based on four underlying conclusions:

I. Municipal corporations cannot exercise powers beyond their territorial limits unless the power to do so is expressly or impliedly (such as a case of public necessity) authorized by statute, and the Michigan case law supporting this conclusion can logically be applied analogously to determine the powers of a housing commission formed by a municipal corporation under the Local Act, as well as an instrumentality of the housing commission.

II. There is no sound argument that explicit or implied authority exists, or that it is necessary or at least manifestly desirable for a municipal corporation or its instrumentality, i.e., a local housing commission, to contract to provide these services outside the limits of the municipality.

III. In light of the State Housing Development Authority Act of 1966 (346 PA 1966; MCL 125.1401, et seq) (the "State Act") for the creation of a state-wide housing authority, the laws of statutory construction applicable to conflicting or overlapping areas of law would seemingly prohibit a local housing commission incorporated under the Act (or instrumentality thereof) from operating throughout the entire state of Michigan.

IV. Neither the state nor federal law intended that governmentally-created public housing agencies or their instrumentalities would have the power to act as public housing agencies in any other jurisdiction for purposes of the project-based Section 8 subsidy program. Such an intention would need to be clearly expressed.

Background

The constitutionality of the Local Act and the validity of the Michigan Legislature's delegation to cities, villages, townships and counties of the power to deal with local housing concerns and to create housing commissions to own and operate public housing on behalf of the incorporating municipality are discussed in detail in In re Brewster Street Housing Site in City of Detroit, 291 Mich 313; 289 NW 493 (1939). Excerpts from this case that tell the history of the origins of the Local Act are set forth in Exhibit A to this letter. In brief, the Local Act authorizes Michigan cities, villages, townships and counties to eliminate housing conditions that are detrimental to the public peace, health, safety, morals or welfare, and to purchase, acquire, construct, maintain, operate, improve, extend or repair housing facilities and engage in numerous other activities related to the elimination of housing conditions detrimental to the public peace, health, safety, morals or welfare. In furtherance of these goals, cities, villages, townships and counties were authorized to form housing commissions as public bodies corporate with the powers enumerated in the statute and such other powers as may be necessary to carry out the purposes of the Local Act.

I. Limits on the Powers of Municipal Corporations

The power of cities, villages, townships and counties (referred to herein as municipal corporations) in Michigan to govern themselves flows from the general authority for self-government set forth in the Michigan Constitution adopted in 1963 (the "State Constitution"), as more fully discussed below. Additional powers may be conferred by the legislature, such as the authority granted to cities, villages, townships and counties under the Local Act to establish housing commissions and the powers granted to housing commissions to carry out the purposes of the Local Act. "The legislature creates municipal corporations, defines and limits their powers, enlarges or diminishes them at will, points out the agencies which are to exercise them, and exercises a general supervision and control of them as it shall deem proper and needful for the public welfare." See Board of Park Commissioners v Common Council of Detroit, 28 Mich 227 (1873). See also Dooley v City of Detroit, 370 Mich 194; 121 NW2d 724 (1963), in which the court cites City of Kalamazoo v Titus, 208 Mich 252, stating: "... home-rule cities do not possess plenary powers and may not, absent legislative grant, assume powers *not essential to local self-government*." (emphasis added)

It is axiomatic that the law defining the powers of municipal corporations must also apply to agencies, instrumentalities and subdivisions of municipal corporations. It is also axiomatic that the powers granted to a housing commission by the incorporating municipal corporation pursuant to a legislative grant cannot exceed the powers that may be exercised by the municipal corporation in its own right. The results if the law were to be interpreted otherwise would be absurd. Therefore, defining the power that may be exercised by a housing commission created under the Local Act can be done by examining the law applicable to municipal corporations.

Article 7, Section 22 of the State Constitution provides the basic grant of legislative power to cities and villages. "Each such city and village shall have power to adopt resolutions and ordinances *relating to its municipal concerns, property and government*, subject to the constitution and law." (emphasis added) Because of the implied restriction on the power of municipal corporations - that they

have no authority to act outside their territorial boundaries - other sections of the 1963 Constitution expressly grant authority to act outside the local boundaries when deemed necessary to the proper exercise of their powers (e.g., see Article 7, Sections 23 and 24, which give explicit authority to cities and villages to acquire property or to establish public service facilities outside their corporate limits for works involving public health or safety, or supplying utilities to their inhabitants. See also the Home Rule City Act, 279 PA 1909, MCL 117.4e and 117.4f(c), which gives express authority to a city to provide in its charter that it may act outside city limits to acquire property, or for the construction of public utilities, or other matters of public necessity).

The case law on the subject is clear. In City of Coldwater v Tucker, 36 Mich 474 (1877), the City of Coldwater had constructed a drainage ditch across private property lying outside city limits. In its review of whether the city had the power to do so, the court wrote: "The general doctrine is clear that a *municipal corporation cannot usually exercise its powers beyond its own limits*. (emphasis added) If it has in any case authority to do so, the authority must be derived from some statute which expressly or impliedly permits it. There are cases where considerations of public policy have induced the legislature to grant such power. The commonest instances are where a supply of water can only be obtained from a distance." The court went on to reason "In the present case, for example, if there can be any implication that sewerage may be provided beyond the city, it must arise from the existence of a state of facts which renders it either actually necessary, or at least manifestly desirable." (Tucker pp 477-478)

In Sabaugh v City of Dearborn, 384 Mich 510; 185 NW2d 363 (1971), a useful analysis on the extent of municipal power is set forth in the dissenting opinion of Justice Adams. Citing Davock v Moore, 105 Mich 120, he wrote:

> Municipal corporations are of a two-fold character, -- the one public, as regards the State at large, in so far as they are its agents in government; the other private, in so far as they are *to provide the local necessities and conveniences* for the citizens. (Emphasis added.)
>
> * * *
>
> Turning next to the authority of municipal corporations ... the powers to be exercised are (1) those granted by express words, (2) those implied in, or incident to, the powers expressly granted, or (3) such powers as are essential to the declared objects or purposes of the corporation."
>
> * * *
>
> The nature and extent of territorial municipal power is analyzed in 37 Am Jur, Municipal Corporations, §122, pp 736, 737 as follows: "*The primary purpose of a municipal corporation is to contribute toward the welfare, health, happiness, and public interest of the inhabitants of such corporation, and not to further the interests of those residing outside its limits*; therefore, the general rule is that municipal corporations have no extra-territorial powers, but their jurisdiction ends at the municipal boundaries and cannot, without specific legislative authority, extend beyond their geographical limits. The legislature may, however, confer jurisdiction upon municipal corporations for sanitary and police purposes, and for license regulation under the police power, over territory contiguous to the corporation. ....the rule has been announced that when a power granted

to a municipal corporation cannot be exercised without going outside the corporate limits, the requisite authority to do so will be implied." (pp 528-530)

II. No Explicit or Implied Authority

Given the general limitations on municipal corporations to act without express or implied authority to do so, the next question is whether there is a sound argument that there is explicit or implied authority, or that it is necessary or at least "manifestly desirable" for a municipal corporation or its instrumentality, i.e., a local housing commission, to contract to provide services outside the limits of the municipality. Given the existence of a state-wide housing agency, as discussed below, it does not appear that such authority exists.

Nowhere in the Local Act is a housing commission or an instrumentality of a housing commission explicitly authorized to act outside its boundaries. The question then follows whether such authorization is implicit. Referring again to Article 7, Section 22 of the State Constitution, a proper analysis must determine whether the activity in question is related specifically to the municipal corporation's municipal concerns, property or government. For such authorization to be implicit, the power to act as a public housing authority and carry out a federal housing program for the entire state of Michigan and to serve residents throughout the state must be necessary to the objects of local municipal self-government.

The specific purposes of the Local Act, as expressed by the Michigan Legislature, are as follows:

AN ACT to authorize any city, village, township, or county to purchase, acquire, construct, maintain, operate, improve, extend, and repair housing facilities; to eliminate housing conditions which are detrimental to the public peace, health, safety, morals, or welfare; and for any such purposes to authorize any such city, village, township, or county to create a commission with power to effectuate said purposes, and to prescribe the powers and duties of such commission and of such city, village, township, or county; and for any such purposes to authorize any such commission, city, village, township, or county to issue notes and revenue bonds; to regulate the issuance, sale, retirement, and refunding of such notes and bonds; to regulate the rentals of such projects and the use of the revenues of the projects; to prescribe the manner of selecting tenants for such projects; to provide for condemnation of private property for such projects; to confer certain powers upon such commissions, cities, villages, townships, and counties in relation to such projects, including the power to receive aid and cooperation of the federal government; to provide for a referendum thereon; to provide for cooperative financing by 2 or more commissions, cities, villages, townships, or counties or any combination thereof; to provide for the issuance, sale, and retirement of revenue bonds and special obligation notes for such purposes; to provide for financing agreements between cooperating borrowers; to provide for other matters relative to the bonds and notes and methods of cooperative financing; for other purposes; and to prescribe penalties and provide remedies.

The primary power of local housing commissions is expressed in Section 2 of the Local Act (MCL 125.652):

Any city, village, township or county of the state of Michigan may purchase, acquire, construct, maintain, operate, improve, extend or repair housing facilities and eliminate

> housing conditions which are detrimental to the public peace, health, safety, morals or welfare.

The enumerated powers of local housing commissions under the Local Act are many – those which, in pertinent part, provide authority to a housing commission to administer federal housing programs are expressed in Sections 6(2) and 46 (MCL 125.656 and 125.696):

> Sec. 6.
>
> (2) A commission may solicit, accept, and enter into agreements relating to, grants from any public or private source, including the state or federal government or any agency of the state or federal government, and may carry out any federal or state program related to the purposes for which the commission is created. The governing body of an incorporating unit may adopt a resolution that requires approval by the governing body before the commission may accept or enter into agreements relating to 1 or more types of grants.
>
> * * *
>
> Sec. 46.
>
> In addition to the powers conferred by other provisions of this act, any borrower shall have power to borrow money or accept grants or other financial assistance from the federal government for or in aid of any housing project .... It is the purpose and intent of this act to authorize every borrower or commission created by such borrower to do any and all things necessary or desirable to secure the financial aid or cooperation of the federal government in the purchasing, acquiring, constructing, maintaining, operating, improving, extending and/or repairing of housing facilities and/or the elimination of housing conditions which are detrimental to the public peace, health, safety, morals and/or welfare.

The power of a housing commission under the Local Act to administer federal programs within its territorial limits is clear. Is there, however, implicit authority for a housing commission or an instrumentality thereof to provide such services outside those limits and for residents throughout the state? Without more than what is provided in the sections quoted above, it cannot be inferred that the grants of power to local housing commissions were intended to go beyond the borders of the municipalities within which they operate.

In Michigan Municipal Liability and Property Pool v Muskegon County Board of County Road Commissioners, 235 Mich App 183; 597 NW2d 187 (1999), a county road commission entered into an employment agreement with the City of Norton Shores in connection with a road improvement project. The agreement was for the purpose of employing the City's engineer to provide services to the project being undertaken by the road commission and included an agreement to indemnify the City in the event of any claim arising out of the services to be provided. Following a judgment obtained by a third party against the road commission and the City for damages arising out of the engineer's design, the City of Norton Shores assigned its rights under the indemnification agreement to a self-insurance pool of which the City was a member. In response to a suit by the insurance pool, the county road commission argued that the indemnification agreement was unenforceable as being ultra vires, or outside the scope of its authority. The insurance pool argued that other enumerated powers of the road commission, including the

power to enter into employment contracts, gave the road commission the implicit power to enter into an indemnification agreement relating to the employment contract, nor did the road commission statute expressly prohibit indemnification agreements.

The court wrote:

> The Legislature is granted the authority to create the county road law and the road commission pursuant to Const.1963, art. 7, § 16. However, a county's authority, like the authority of townships, cities, and villages, is derived from and limited by the constitution and valid state statutes. Arrowhead Development Co. v. Livingston Co. Rd. Comm., 413 Mich. 505, 511-512, 322 N.W.2d 702 (1982); Gray v. Wayne Co., 148 Mich.App. 247, 384 N.W.2d 141 (1986). Our Supreme Court "has repeatedly stated, local governments have no inherent powers and possess only those limited powers which are *expressly conferred* upon them by the state constitution or state statutes or which are *necessarily implied* therefrom." Hanselman v. Wayne Co. Concealed Weapon Licensing Bd., 419 Mich. 168, 187, 351 N.W.2d 544 (1984), citing Alan v. Wayne Co., 388 Mich. 210, 200 N.W.2d 628 (1972); Mason Co. Civic Research Council v. Mason Co., 343 Mich. 313, 72 N.W.2d 292 (1955). *A power is "necessarily implied" if it is essential to the exercise of authority that is expressly granted.* See, generally, Dries v. Chrysler Corp., 402 Mich. 78, 79, 259 N.W.2d 561 (1977) (power of Worker's Compensation Appeal Board to dismiss appeals for noncompliance with its rule requiring that appealing party file transcript within thirty days of filing of claim for review is necessarily implied from statute granting board authority to make rules on appellate procedure, in that power to dismiss is essential to enforcement of such procedural rules); Stebbins v. Judge of Superior Court of Grand Rapids, 108 Mich. 693, 698, 66 N.W. 594 (1896) ("Municipal corporations possess only those powers which are expressly conferred or necessarily implied, in consequence of their being essential to the exercise of their proper functions."); Vance v. Ananich, 145 Mich.App. 833, 836, 378 N.W.2d 616 (1985) ("Subpoena power not expressly conferred will not be implied unless essential to fulfillment of the objectives of a statute.")
>
> M.C.L. § 224.10; M.S.A. § 9.110 does not empower a county road commission to enter into an indemnification agreement as a condition to hiring an engineer or consultant, because that power is not *necessarily implied* from a county road commission's *expressly* granted authority to hire such professionals. In our view, *the power to enter into indemnification agreements is not essential to any power that has been expressly conferred* on a county road commission. If the Legislature determines to grant such authority to county road commissions, it may do so, but we will not infer a power that is not essential to the proper exercise of expressly conferred authority.

It is not essential to the exercise of the authority of a housing commission incorporated under the Local Act or any instrumentality (including nonprofit or for profit corporations) that may be formed by such a housing commission to administer a federal housing program for the entire state of Michigan. Therefore, such power may not be implied.

III. State-wide Jurisdiction of State Housing Authority

Even if we were to conclude above that there is implied authority for a municipal corporation or an agency or instrumentality thereof to agree to administer federal housing programs for the benefit of

residents outside its borders and carry out those duties over the entire state, it is our opinion that the powers and authority granted to the Michigan State Housing Development Authority (the "Authority") under the State Act would preempt such implicit grant under the Local Act. The Local Act was first enacted in 1933 for the purpose of enabling municipal corporations throughout the state to provide housing for their low income residents, accept benefits being made available by the federal government during the Depression, and eliminate housing conditions detrimental to the health, safety and welfare of their residents. In 1966, the Michigan Legislature created the Authority as a state-wide housing authority. The governing body of the authority includes three heads of principal departments of the executive branch of state government and five persons all appointed by the governor with the advice and consent of the Michigan senate. The wide-ranging powers to deal with housing matters in this state that were granted to the Authority under the State Act overlap with and far exceed the powers of municipal corporations and their housing commissions under the Local Act. The powers granted to the Authority include the power:

- to undertake and carry out studies and analyses of housing needs *within the state* and ways of meeting those needs;
- to make the results of those studies and analyses available to the public and the housing and supply industries;
- to survey and investigate housing conditions and needs, both urban and rural, *throughout the state*, and make recommendations to the governor and the legislature to alleviate any existing housing shortage *in the state*;
- to make loans to private individuals and business organizations for the construction or rehabilitation of housing and related facilities;
- to encourage community organizations to assist in initiating housing projects;
- to engage and encourage research in new and better techniques and methods for increasing the supply of housing for eligible persons;
- *to accept gifts, grants, loans, appropriations, or other aid from the federal, state, or local government, from a subdivision, agency, or instrumentality of a federal, state, or local government, or from a person, corporation, firm or other organization*;
- to lease real or personal property and to *accept federal funds* for, and *participate in, federal programs of housing assistance*;
- to provide technical assistance in the development of housing projects and in the development of programs to improve the quality of life for *all the people of the state*;
- to encourage and engage or participate in programs to accomplish the preservation of housing *in the state;* and
- to issue Bonds and Notes to finance *housing projects* and the making or purchasing of loans for the rehabilitation of residential real property. (emphasis added)

By creating a state-wide housing authority, the Legislature effectively excluded municipally-created housing commissions from exercising the powers of the Local Act on a state-wide basis, or even beyond their own borders. This is more obvious when considering that the State Legislature bestowed state-wide authority in the State Act, and there being no similar mention in the Local Act. In State Bar of Michigan v Galloway, 124 Mich App 271; 335 NW2d 475 (1983), the court stated: "It is presumed that the Legislature knows of and intends to legislate in harmony with existing law. Therefore, where statutes are in pari materia, each must be given effect if such can be done without repugnancy, absurdity, or unreasonableness." If the jurisdiction and powers of the local housing commissions were construed to be the same as that of the state housing authority, or if a local housing commission was authorized to carry out its purposes to serve residents within the boundaries of another municipality that had also incorporated its own housing commission, then either the Local Act or the State Act would be rendered entirely redundant. It is our opinion that the Michigan Legislature cannot have intended such an absurd

result. In fact, Section 3(d) of the Local Act does address the situation of a county that forms a housing commission whose jurisdiction overlaps with the area incorporated into a city located within that county - in essence where there are two municipal corporations acting in the same territory – and in that case, the Local Act provides that the county housing commission shall only have such functions, rights, powers, duties and liabilities as may be provided by contractual agreement between the county and the incorporated area. No similar provision for a housing commission endeavoring to act throughout the state-wide jurisdiction of the Authority (or *vice versa*) is found in the Local Act.

Other rules of statutory construction are also in agreement with this conclusion. One such rule is that where two statutes encompassing the same subject matter conflict, the most recently enacted statute generally controls. In Irons v 61st Judicial District Court Employees, 139 Mich App 313, the court reviewed two conflicting laws relating to public employee labor relations and concluded that the more recently enacted law was controlling. The court stated: "In general, where two statutes which encompass the same subject matter conflict, the later enacted statute controls", citing People v Flynn, 330 Mich 130; 47 NW2d 47 (1951). Thus, the Legislature cannot have intended that locally-created housing authorities should have state-wide authority to act in conflict with the clear intent of the later-enacted State Act to grant such power to the Authority. The same court goes on to express another such rule: "Again, where two statutes which encompass the same subject matter conflict, the more specific statute will control", citing People v Shaw, 27 Mich App 325; 183 NW2d 390 (1970). The express powers of the Authority under the State Act must be controlling over the Local Act's very non-specific "for any purpose not inconsistent with the purposes for which the commission was formed."

There are state-level preemption principles that apply by analogy as well, suggesting a limitation on the reach of a local housing commission's authority, when a state-level entity exists with the same or substantially overlapping authority. See People v. Llewellyn, 401 Mich 314 (1977); 257 NW2d 902 (1977). "A municipality is precluded from enacting an ordinance if . . . 2) if the state statutory scheme pre-empts the ordinance by *occupying the field of regulation which the municipality seeks to enter*, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation." Llewellyn at 322. (emphasis added). See also Attorney General v City of Detroit, 225 Mich 631, 640; 196 NW 391 (1923), in which the court cited Coleman v LaGrande, 73 Or. 521 (144 Pac. 468): "Within their boundaries cities are clothed with power to regulate matters purely local....Beyond such municipal boundaries *and in matters of general concern not pertaining solely to local municipal affairs*, cities are amenable to the general laws of the State...." (emphasis added) Reviewing these and other similar case law reveals not only the limitation on municipal corporations proposing to act outside their own borders, but even *within* their own borders, if the matter involved is within the general statutory powers of a state-wide body created by the legislature.

IV. Limits on Authority Under State and Federal Law

The functions of housing authorities as instrumentalities of the incorporating municipalities are purely governmental in nature. They are creatures of statute and derive their authority from Michigan's constitution and legislature. A non-profit corporation formed within this state by an out-of-state governmental entity cannot have the power to act as a governmental agency within this state, unless *specifically* authorized to do so by the laws of its own state and of this state. The general authority of municipalities and their instrumentalities to function as public housing agencies in the state of Michigan is found in Section 2 of the Local Act (MCL 125.652): "Any city, village, township or county *of the state of Michigan* may purchase, acquire, construct, maintain, operate, improve, extend or repair housing facilities and eliminate housing conditions which are detrimental to the public peace, health, safety, morals or welfare." (emphasis added)

The jurisdiction of state agencies, municipalities and their instrumentalities must be strictly limited to their own state and municipal boundaries, unless (1) explicit or implicit statutory authority empowers them to act outside those boundaries and (2) there is no existing, governmental authority with similar powers and whose jurisdiction covers the territory in which the out-of-area or out-of-state entity seeks to operate. To allow it to be otherwise would be contrary to sense and reason, and in direct conflict with the laws of the home state. If it were otherwise, the City of Detroit could organize a non-profit corporation in the state of Massachusetts to assume the municipal duties of the City of Boston, for example, or the state of Michigan could form a non-profit corporation to assume the housing program responsibilities of HUD throughout the United States, even though no legislation authorizing these extra-territorial activities in any of the affected jurisdictions had been adopted. The results would be absurd.

The authorizing provisions for public housing authorities to contract with HUD and administer the Section 8 housing program within their jurisdictions is found in 42 U.S.C. 1437a(b)(6)(A):

> (A) In general.--Except as provided in subparagraph (B), the term "public housing agency" means any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of public housing.

Although it is not expressly stated that geographical limits on the authority of any governmental entity or public body to engage or assist in the operation of public housing exist, we believe that Congress recognized and must recognize the natural limitations on state sovereignty and on the authority of governmentally-created entities, and that those limits are implicit. Congress has the power to authorize any public housing agency to act outside its territorial limits for purposes of the federal government; but has not done so in 42 U.S.C. 1437a(b)(6)(A). In 42 U.S.C. 1437a(b)(6)(B) (the subparagraph B referred to above), Congress expressly expanded the definition of public housing agency to include, *but only for purposes of the tenant-based assistance program*:

> (ii) any other public or private nonprofit entity that, upon the effective date under section 503(a) of the Quality Housing and Work Responsibility Act of 1998, was administering any program for tenant-based assistance under section 1437f of this title (as in effect before the effective date of such Act), pursuant to a contract with the Secretary or a public housing agency; *[OR]*
>
> (iii) *with respect to any area in which no public housing agency has been organized or where the Secretary determines that a public housing agency is unwilling or unable to implement a program for tenant-based assistance under section 1437f of this title, or is not performing effectively—*
>
> (I) the Secretary or another public or private nonprofit entity that by contract agrees to receive assistance amounts under section 1437f of this title and enter into housing assistance payments contracts with owners and perform the other functions of public housing agency under section 1437f of this title; or
>
> (II) *notwithstanding any provision of State or local law*, a public housing agency for another area that contracts with the Secretary to administer a program for housing assistance under section 1437f of this title, *without regard to any otherwise applicable limitations on its area of operation.* (emphasis added)

The express language of Section 1437a(b)(6)(B) permits public housing agencies from other jurisdictions and non-profit entities to act as the public housing agency only where no other public housing agency exists or is capable of effective function. This exception cannot apply where an effectively performing public housing agency already exists, is willing to perform and is currently implementing programs for tenant-based assistance. Where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acted intentionally and purposely in the disparate inclusion or exclusion. INS v Cardoza-Fonseca, 480 US 421, 432 (1987) (citations omitted).

Conclusion

Because the Michigan Legislature has clearly chosen to create a state-wide housing authority to carry out state-wide programs relating to housing, and because of the limitations on municipal corporations and their subsidiaries and instrumentalities to act outside of their own borders, especially given in light of the substantial overlap between the State Act and the Local Act, it is our opinion that no local government or instrumentality of that local government has the authority to implement programs of housing assistance throughout the State of Michigan. We reach the same conclusion with respect to any out-of-state governmental entity. While we are not in a position to opine as to federal law, we are led to conclude that no such authority has been granted or intended by Congress or Michigan's Legislature. In fact, the State Act advances the legislature's intent for housing programs to be addressed by a state authority that possesses unique knowledge of the housing landscape within the State of Michigan.

This letter constitutes advice at the division level and is not the formal opinion of the Attorney General.

Sincerely,

Ronald H. Farnum
First Assistant Attorney General

Jarrod T. Smith
Assistant Attorney General

Finance Division
517-373-1130

RHF:JTS/sh
Enc.
cc: Molly Jason

2012-0013081-A/MSHDA HUD Memo Statewide Authority 2012/Heidel Letter

EXHIBIT A

Excerpts from In re Brewster Street Housing Site in City of Detroit, 291 Mich 313; 289 NW 493 (1939):

> In 1933, the congress of the United States, as part of its public works program, provided by the National Industrial Recovery Act, title 2, for the spending of money for low-cost housing and slum-clearance projects. 48 Stat. 195, 200, 40 U.S.C.A. § 401 et seq. The program was directed by a Federal emergency administrator of public works who was empowered, upon such terms as the president should prescribe, to make grants to States, municipalities, or other public bodies for the construction, improvement, or repair of low-cost housing and slum-clearance projects, and to acquire by purchase or the power of eminent domain any real or personal property in connection with the construction of such project. See 40 U.S.C.A. §§ 402, 403(a). Congress appropriated $3,300,000,000 to carry on the purposes of the act.
>
> In order to make the State eligible to participate, the governor summoned the Michigan legislature to an extra session convening November 22, 1933. While in session, the legislature received a message from the governor which stated in effect that the National Industrial Recovery Act had appropriated $3,300,000,000 for public works; that, although the people of Michigan were paying their proportion of the appropriated fund, the State and its municipal subdivisions had failed to qualify a single project; that the reason for the failure to qualify was constitutional prohibitions which could be surmounted only by the passage of emergency legislation dealing with the subject; and to that end he presented to the legislature for its consideration a housing bill, drafted by the corporation counsel of the city of Detroit and approved by the public works administrator, which was designed to permit Michigan municipalities to undertake such work. Michigan House J1. (Ex.Sess.1933-1934), pp. 89, 90.
>
> The legislature, January 9, 1934, passed Act No. 18, Pub. Acts 1933 (Ex.Sess.). Section 2 provides that any city or incorporated village having a population of over 500,000 is authorized 'to purchase, acquire, construct, maintain, operate, improve, extend, and/or repair housing facilities and to eliminate housing conditions which are detrimental to the public peace, health, safety, morals, and/or welfare.' Section 3 authorizes any city with a population of over 500,000 to create by ordinance a commission with power to accomplish the purposes set forth in section 2. Section 4 provided that the commission should consist of five members who should serve for five years without compensation, to be appointed by the governor. Act No. 80, Pub. Acts 1935, amended section 4 to provide that the commission shall consist of five members to be appointed by the chief administrative officer of the city or incorporated village. Section 7 provides that the commission shall have the power and duty, (a) to determine in what areas of the city it is necessary to provide sanitary housing facilities for families of low income and for elimination of housing conditions injurious to public health; (b) to

purchase, lease, sell, exchange, transfer, assign and mortgage any property, real or personal, or any interest therein, or acquire the same by gift, bequest, or under the power of eminent domain; to own, hold, clear and improve such property, or alter, improve or extend; to lease or operate any housing project or projects; (c) to rent only to such tenants as are unable to pay for more expensive housing accommodations. ...

* * *

Section 40 states: 'This act, being necessary for and to secure the public peace, health, safety, convenience and welfare of the cities and incorporated villages and the people of the state of Michigan, shall be liberally construed to effect the purposes thereof.'

Section 43 recites that, whereas, there is a demand in congested sections of Michigan for housing of families of low income and for the reconstruction of slum areas and no existing laws or charters provide for the organization of public housing commissions as contemplated in the National Industrial Recovery Act, 'This act is hereby declared to be immediately necessary for the preservation of the public peace, health, safety, convenience and welfare of the people of the state of Michigan.'

* * *

Meanwhile, the congress of the United States ... passed an act, September 1, 1937, which sought to preserve the housing program and avoid the unconstitutional provisions of the National Industrial Recovery Act, title 2. 50 Stat. 888, 42 U.S.C.A. § 1401 et seq. This act and the United States Housing Act had a threefold purpose: (1) to decentralize housing construction by withdrawing the Federal government from housing activity; (2) to insure the continuation of a housing program by the States; and (3) to eliminate substandard homes and confine low-cost housing to persons in the low-income groups. It limits the activity of the Federal government to financing State and municipal housing authorities who will condemn property, establish rental rates and conditions of occupancy. To accomplish the second purpose, the act provides that there shall be created in the department of the interior a United States housing authority which may render financial assistance to municipal housing agencies by (a) loans; (b) loans, plus annual contributions; (c) capital grants. Loans may be as high as 100 per cent of the total cost if repaid within a period not to exceed 60 years, at the going rate of interest plus one-half of one per cent. If annual contributions are made, then the loans may not exceed 90 per cent of the development or acquisition cost of such project. In order to make sure that the money loaned will be spent for low-cost housing and for persons in the low-income groups, the act sets up conditions which the local housing commission must follow. The more important of these conditions are, (1) persons eligible must be in the lowest income group, for whom private enterprise cannot afford to build an adequate

supply of decent, safe and sanitary dwellings; (2) the persons who occupy the dwellings must be persons whose net income does not exceed five times the rental (including the value or cost to them of heat, light, water and cooking fuel), except that in the case of three or more dependents such ratio shall not exceed six to one; (3) the average construction cost shall not exceed the cost of dwellings currently produced in the locality by private enterprise; (4) no annual contributions shall be made unless the project includes the elimination by demolition, condemnation, and effective closing, or the compulsory repair of unsafe or unsanitary dwellings situated in the locality or the metropolitan area, substantially equal in number to the number of newly constructed dwellings provided by the project. In *328 order to withdraw the Federal government from the management of housing projects, it was provided by section 12(b), 42 U.S.C.A. § 1412(b), that 'as soon as practicable the Authority shall sell its Federal projects or divest itself of their management through leases.'

* * *

Before this time, Act No. 18, Pub.Acts 1933 (Ex.Sess.) was amended with a view towards securing funds under the new Federal act. Changes unimportant in the present controversy were made by Act No. 265, Pub. Acts 1937. September 8, 1938, the legislature, in special session, on recommendation of the governor (Senate J1. 1938 [Ex.Sess.], p. 11), made certain amendments and additions to Act No. 18, Pub. Acts 1933 (Ex.Sess.), by Act No. 5, Pub. Acts 1938 (Ex.Sess.). Sections 2 and 3 were amended to provide that any city may by ordinance create a housing commission to construct low-cost housing facilities and eliminate housing conditions detrimental to the public peace, health and welfare. Section 17 provides that for the purpose of defraying the cost of purchasing, constructing, extending or repairing any housing project any commission may borrow money and issue bonds therefor. This section also provides that bonds may be sold to the United States housing authority upon certain enumerated conditions. Section 27 requires all housing commissions to follow certain minimum rental requirements. These requirements are drawn so as to fit together with the conditions in the Federal Housing Act for the expenditure of loans and in effect provide that rentals shall be fixed at the lowest possible rates consistent with providing decent, safe and sanitary dwelling accommodations ...."

ROY COOPER
ATTORNEY GENERAL

State of North Carolina
Department of Justice
PO Box 629
RALEIGH, NORTH CAROLINA
27602-0629

REPLY TO:
L. MCNEIL CHESTNUT
SERVICES TO STATE AGENCIES
PHONE: 919.716.6800
FAX: 919.716.0584
E-MAIL: MCHEST@NCDOJ.GOV

2 June 2012

Jennifer Percy
Counsel
North Carolina Housing Finance Agency
3508 Bush Street
Raleigh, North Carolina 27609

Re: Advisory Letter - - Administration of Project-based Contracts for HUD Section 8 Rental Subsidies Statewide

Dear Ms. Percy:

This will respond to your request on behalf of the North Carolina Housing Finance Agency ("NCHFA") for an opinion from the Office of the Attorney General on the question of whether or not the NCHFA is the only entity authorized under North Carolina law to be the administrator of a Project-Based Section 8 Housing Assistance Payments contract in this State. For the reasons expressed below, it is my opinion that the NCHFA is the only entity in this State with the exclusive authority to administer a statewide Project-Based Section 8 contract.

1. Factual Background.

By way of background, we understand that the Project-Based Section 8 Housing Assistance Payments program was created by the Housing and Community Development Act of 1974.[1] The Housing Assistance Payments program is a rent subsidy program that assists eligible low income families in obtaining decent, safe and sanitary housing. Families receive the benefit of a rent subsidy, known as a housing assistance payment, equal to the difference between their share of the rent and the rent charged by the owner. Owners, who may be public or private, receive the housing assistance payments directly from the United States Department of Housing and Urban Development ("HUD") or one of its Performance-Based Contract Administrators ("Contract Administrator").[2]

[1] Housing and Community Development Act of 1974, 42 U.S.C. §§5301-5321.
[2] 42 U.S.C. § 1437f.

NCHFA has served as Contract Administrator in North Carolina for over ten years. As Contract Administrator, NCHFA is responsible for annual on-site visits to properties, monthly desk reviews, adjustments to rents, reviews of utility allowances and advising and assisting property owners in over 600 properties located throughout this State.

Currently, HUD is engaging in a new competitive process to select Performance-Based Contract Administrators for its Housing Assistance Payments contracts in each state. HUD has issued a Fiscal Year 2012 Notice of Funding Availability for the Performance-Based Contract Administrator (PBCA) Program for the Administration of Project-Based Section 8 Housing Assistance Payments Contracts ("NOFA") wherein it announced that it would select one Contract Administrator for each state to operate statewide.[3]

The NOFA states it will only accept applications from legally qualified "public housing agencies".[4] Under 42 U.S.C. section 1437a(b)(6)(A), "public housing agency" is defined, for purposes of the project-based rental assistance program, as "any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of public housing."[5] In the NOFA, HUD further defines a qualified in-state applicant as an applicant formed under the laws of the same state which must demonstrate that it (a) satisfies the definition of "public housing agency" in section 3(b)(6)(A) of the 1937 Housing Act, and (b) has the legal authority to operate throughout the entire state.[6] HUD has also stated that it will consider applications submitted by joint ventures and other public/private partnerships between public housing authorities and other public or private for-profit or non-profit entities provided they met the above requirements.[7] According to the NOFA, HUD will select one Performance-Based Contract Administrator in each state (except California) to enter into a single Performance-Based Annual Contract to administer the contracts with owners of Section 8 projects statewide.[8]

NCHFA has reason to believe that a housing authority created under Chapter 157 of the North Carolina General Statutes ("Housing Authorities Law") may either (1) apply directly to HUD in response to the NOFA, or (2) form a new entity comprised of a partnership between a local housing authority and another for-profit or non-profit entity to apply. NCHFA has questioned if a local housing authority created under Chapter 157, or a newly formed entity as described above, has the legal authority to act *statewide* as a qualified public housing agency as required by the NOFA. It is my opinion that any such entity will not have the authority to act statewide.

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[3] DEP'T OF HOUS. AND URBAN DEV, NOTICE OF FUNDING AVAILABILITY (NOFA) FOR THE PERFORMANCE-BASED CONTRACT ADMINISTRATOR (PBCA) PROGRAM FOR THE ADMINISTRATION OF PROJECT-BASED SECTION 8 HOUSING ASSISTANCE PAYMENT CONTRACTS, Docket No. FR-5600-N-33 (2012).
[4] *Id.* at 7.
[5] 42 U.S.C. § 1437a(b)(6)(A).
[6] DEP'T OF HOUS. AND URBAN DEV., Docket No. FR-5600-N-33 at 4.
[7] *Id,* at 4-5.
[8] *Id.* at 7.

The General Assembly created NCHFA when it enacted the North Carolina Housing Finance Agency Act.[9] NCHFA is a body politic and corporate, and it is a public agency and an instrumentality of the State for the performance of essential public functions.[10] NCHFA exists, *inter alia*, to address the serious shortage of decent, safe and sanitary residential housing available at low prices or rentals to persons and families of lower income throughout the state of North Carolina.[11]

We have reviewed the NCHFA's view of the matter expressed in your letter of April 4, 2012, and concur that the Housing Finance Agency Act confers the necessary power and authority for NCHFA to qualify as a public housing authority pursuant to the Housing Act of 1937.[12] For example, to effectuate its purposes, NCHFA has the power, *inter alia*, to participate in any federally assisted lease program for housing for persons of lower income under any federal legislation, including without limitation, section 8 of the National Housing Act[13]; to make or participate in the making of mortgage loans;[14] to acquire on a temporary basis real property;[15] to procure insurance;[16] to borrower money;[17] to provide technical and advisory services to sponsors, builders and developers of residential housing and to residents thereof;[18] to enter into contracts and other instruments necessary or convenient in the exercise of its powers and functions;[19] to receive, administer and comply with the conditions and requirements respecting any appropriation;[20] to sue and be sued in its own name;[21] to employ consultants and employee;[22] to advise the Governor regarding the coordination of public and private low-and moderate-income housing programs;[23] to participate in and administer federal housing programs;[24] as well as to have "all of the powers necessary or convenient to carry out the provisions of this Chapter."[25]

Furthermore, we conclude that the Housing Finance Agency Act explicitly grants NCHFA the authority to operate throughout the entire State of North Carolina. NCHFA was established and empowered to act on behalf of the State of North Carolina and its people in serving this public purpose for the benefit of the general public.[26] It is clear that the intent of the General Assembly was to establish NCHFA to act statewide by the

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[9] N.C. Gen. Stat. §122A.
[10] §122A-4(a).
[11] §122A-2.
[12] 42 U.S.C. §§1437a(6).
[13] N.C. Gen. Stat. §122A-5(1).
[14] §122A-5(2).
[15] §122A-5(6).
[16] §122A-5(8).
[17] §122A-5(10).
[18] §122A-5(13).
[19] §122A-5(15).
[20] §122A-5(16).
[21] §122A-5(17).
[22] §122A-5(21).
[23] §122A-5(24).
[24] §122A-5(25).
[25] §122A-5.
[26] §122A-4(a).

numerous references throughout the Housing Finance Agency Act that it act: "on behalf of the State of North Carolina"; for "the benefit of the people of the State"; to promote "sound growth of North Carolina communities"; to assist in eliminating and preventing blight "throughout North Carolina."[27] Nothing in the Housing Finance Agency Law limits NCHFA's authority to act anywhere within the State of North Carolina.

In sum, the General Assembly has determined that providing affordable housing statewide, especially in rural areas, is necessary to the health, safety and welfare and prosperity of all residents of the State and to the sound growth of North Carolina communities and has therefore provided for broad sweeping powers to NCHFA to fulfill such purposes. These powers include those necessary to administer Project-Based Section 8 Housing Assistance Payments through the *entire* State of North Carolina. Moreover, the General Assembly has given NCHFA explicit authority to enter into contacts with any governmental agency, including the United States government and to participate in and administer federal housing programs.[28]

Local housing authorities in North Carolina are also creatures of state law.[29] After a thorough examination of the Housing Finance Agency Law, the Housing Act and the Housing Authorities Law, we have concluded that a local housing authority's jurisdiction is limited to a particular geographic area (city, county or region).

A housing authority may only be formed if any 25 residents of a city file a petition with the city clerk setting forth that there is a need for an authority to function in the city and said surrounding area.[30] After the petition is filed there must be a public hearing at which the legislative body charged with governing the city will determine the need for said authority.[31] If approved, the legislative body must adopt a resolution and the mayor must then appoint commissioners to act as an authority. The commissioners then must file an application with the Secretary of State.[32]

Throughout the Housing Authorities Law there are explicit geographic limitations placed on housing authorities that prohibit a housing authority from operating statewide. For example the powers of a housing authority and is replete with qualifying language such as "within [the authority's] boundaries" or "within its territorial limits."[33]

Furthermore, the area of operation or territorial limits of housing authorities are explicitly set forth by statute for each of the three types of housing authorities:

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[27] §122A-2.
[28] §122A-5(25).
[29] §157-4.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] § 157-9.

(1) City housing authority: area of operation "shall include said city and the area within 10 miles from the territorial boundaries of said city"[34] and it may operate "within any other city that has a common boundary . . . when requested to do so by resolution" of the other city.[35]

(2) County housing authority: area of operation "shall include all of the county for which it is created."[36]

(3) Regional housing authority: possesses authority "within [its] area of operation,"[37] which is defined as including "all of the counties for which such regional housing authority is created and established."[38]

Although a housing authority may form a corporation under the laws of North Carolina, it can only exercise the powers conferred upon the housing authority in Chapter 157.[39] I am not aware of any means under existing statutes for creating a housing authority with authority to operate statewide. Nor am I aware of any means by which a housing authority could create a separate instrumentality under North Carolina law that would allow it to operate statewide. Therefore, any new entity formed under the laws of the State of North Carolina which consists of a local housing authority and another for profit or non-profit entity would not qualify as a statewide Contract Administrator because the local the authority is still restricted from operating statewide.

II. Conclusion.

For the reasons expressed, I conclude that the NCHFA (1) is clearly a "public housing agency" under 42 U.S.C. §1437a(b)(6)(A); and (2) it is the only public housing agency authorized to administer Project-Based Section 8 Housing Assistance Payments contracts throughout the entire State of North Carolina in that the General Assembly has not created any other entity with the authority to administer a statewide Project-Based Section 8 contract.

I trust this responds to your inquiry to our office. If I may be of further assistance, please let me know. This is an advisory letter based on the information you provided to us and our research into the matter. It is not been prepared in accordance with the procedures for a more formal opinion from the Office of the Attorney General.

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[34] §157-39.1(a).
[35] *Id.*
[36] *Id.*
[37] §157-37.
[38] §157-39.1(a)
[39] §157-9.

With best regards, I am

Sincerely yours,

L. McNeil Chestnut
Special Deputy Attorney General

Attorney General of New Mexico

GARY K. KING
Attorney General

ALBERT J. LAMA
Chief Deputy Attorney General

January 19, 2012

OPINION
OF
GARY K. KING
Attorney General

Opinion No. 12-02

BY: Stephen A. Vigil
Assistant Attorney General

TO: The Honorable Joni Marie Gutierrez
New Mexico State Representative
Box 842
Mesilla, NM 88046

The Honorable Nancy Rodriguez
New Mexico State Senator
1838 Camino La Canada
Santa Fe, NM 87501

QUESTION:

May an out-of-state public housing authority, or an instrumentality of an out-of-state public housing authority, act as a public housing authority in New Mexico in light of the New Mexico Mortgage Finance Authority Act, NMFA 1978, Chapter 58, Article 18, which designates the New Mexico Mortgage Finance Authority ("MFA") as the single state housing authority in New Mexico?

CONCLUSION:

By statute, MFA is designated as the single state housing authority in New Mexico. An out-of-state public housing authority or instrumentality of an out-of-state public housing authority has no authority to act as a public housing authority within New Mexico.

BACKGROUND:

Our opinion was requested because of the possibility that the U.S. Department of Housing and Urban Development ("HUD") will award the contract for the administration of HUD's Project-Based Section 8 Housing Assistant Payments ("HAP") Contracts Program for the State of New Mexico to a public housing agency incorporated and located out of state, on the premise that the organization will be able to operate as a public housing authority within the state under New Mexico law.

In March 2011, HUD issued an "Invitation for Submission of Applications: Contract Administrators for Project-Based Section 8 Housing Assistance Payments (HAP) Contracts." The Invitation's purpose was to solicit applications from public housing agencies to administer the HAP contracts program in each state. The Invitation was issued pursuant to Section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437f. Since 2000, MFA had been responsible for administering the New Mexico HAP contracts program. However, after reviewing the applications it received in response to the March 2011 Invitation, HUD announced that it would designate Southwestern Housing Compliance Corporation ("SHCC"), an instrumentality of the Housing Authority of Austin, Texas, to be the contracts administrator for New Mexico.

HUD made similar determinations throughout the United States, selecting entities incorporated outside of those states to administer their HAP contracts programs. MFA, along with similarly-situated public housing agencies in other states, protested the procurement process for the HAP contract administrators. HUD subsequently withdrew the contract award but has since indicated that it will commence another bidding process in which it will accept applications from out-of-state bidders if they include a legal opinion that they are eligible to operate as a public housing agency throughout the state for which they are applying.

ANALYSIS:

MFA was created by the New Mexico legislature in 1975 as:

> a public body politic and corporate, separate and apart from the state, constituting a governmental instrumentality ... acting in all respects for the benefit of the people of the state in the performance of essential public functions and ... serving a valid public purpose in improving and otherwise promoting their health, welfare and prosperity....

NMSA 1978, § 58-18-2(F). In 1998, the Legislature consolidated and transferred certain housing programs to the MFA and changed its designation. *See* Laws 1998, ch. 63, § 6. The title of Section 58-18-5.5 of the Mortgage Finance Authority Act ("Act") is: "Additional powers of authority; *authority designated as single state housing authority* ... " (emphasis added). Pursuant to Section 58-18-5.5(A), MFA "is designated as the state housing authority for all purposes." Furthermore, the MFA "shall administer federal and state housing programs and federal tax credit provisions associated with those programs." NMSA 1978, § 58-18-5.5(C). The term "state" is defined as New Mexico. NMSA 1978, § 58-18-13(T). The foregoing provisions make clear that the legislature has designated MFA as the single public housing authority in New Mexico with statewide jurisdiction.[1]

For purposes of the U.S. Housing Act of 1937, a "public housing agency" is defined as: "Any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of public housing." 42 U.S.C. § 1437a(b)(6)(A). Under this definition, an entity must be "authorized" by state law to develop or operate public housing in the state before it can qualify as a public housing agency in that state.[2]

Our review of state law reveals that it does not allow out-of-state entities, including entities such as SHCC that are public housing authorities under the laws of other states, to act as public housing authorities in New Mexico. MFA is the sole entity authorized by the state legislature "to engage in or assist in the development or operation of public housing" throughout the state. As discussed above, the title of Section 58-18-5.5 states that MFA is the single state housing authority and Subsection A formally designates MFA as such. Furthermore, Subsection C clearly indicates that MFA is in charge of administering federal programs, which would include the Section 8 HAP contracts program. Because MFA is statutorily designated as the state's only state housing authority with statewide jurisdiction, and New Mexico law does not otherwise authorize an out-of-

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[1] The New Mexico legislature has authorized the creation of other public housing authorities within the state; however, in contrast to MFA, those entities' jurisdictions are limited. *See* Municipal Housing Law, ch. 3, art. 45 1965, as amended through 2009 (authorizing a city or county to create local housing authorities to operate and manage housing projects and affordable housing programs within the city or county); Regional Housing Law, ch. 11, art. 3A (1994, as amended through 2009) (creating regional housing authorities with operations confined to their respective regions).

[2] We believe it goes without saying that a state cannot properly authorize a public housing authority created under that state's law to operate as a public housing authority in another state. Federal law could confer the requisite authority on an out-of-state housing authority but has not done so under the circumstances presented here. *Cf.* 42 U.S.C. § 1437a(b)(6)(B)(iii)(II) (expanding definition of "public housing agency" in the U.S. Housing Act "[f]or purposes of the program for tenant-based assistance under section 8" to include, "notwithstanding any provision of State or local law, a public housing agency for another area that contracts with [HUD] to administer a program for housing assistance under section 8, without regard to any otherwise applicable limitations on its area of operation" when "no public housing agency has been organized or where [HUD] determines that a public housing agency is unwilling or unable to implement a program for tenant-based assistance ... or is not performing effectively ...").

state entity to act as a public housing authority in New Mexico, we conclude that the law necessarily prohibits out-of-state public housing authorities and their instrumentalities from acting as public housing authorities in New Mexico.

GARY K. KING
Attorney General

STEPHEN A. VIGIL
Assistant Attorney General

MFA | Housing New Mexico

January 23, 2012

Marie Head
Deputy Assistant Secretary
Office of Multifamily Housing Programs
U.S. Department of Housing and Urban Development
451 7th Street SW
Room 6106
Washington, D.C. 20410

Re: Section 8 Project Based Contract Administration in New Mexico

Dear Ms. Head:

As Executive Director of the New Mexico Mortgage Finance Authority ("MFA"), I am writing to bring to your attention a newly-issued opinion of the Attorney General of New Mexico regarding the ability of an out-of-state housing authority, or its instrumentality, to operate as a public housing authority in the State of New Mexico. Please find enclosed a copy of the opinion in its entirety.

We believe that it is critical that HUD officials in the Office of Multifamily Housing Programs be made aware of the Attorney General's Opinion prior to the release of the Notice of Funding Availability for the PBCA contract for New Mexico. As the Attorney General's Opinion makes clear, New Mexico law grants exclusive authority to the MFA to act as a public housing authority for and throughout the State of New Mexico, and no out-of-state housing agency may operate as a public housing authority in this state.

Please feel free to contact me with any questions or to discuss this matter further.

Sincerely,

Jay Czar
Executive Director

cc: Michael Backman, Multifamily Hub Director
Joseph Pennel, Director of Operations, Ft. Worth Hub
Kenneth E. Byrd, Director, Albuquerque Program Center

THE NEW MEXICO MORTGAGE FINANCE AUTHORITY
344 4th Street SW, Albuquerque, New Mexico 87102
505.843.6880 800.444.6880
housingnm.org

Attorney General of New Mexico

GARY K. KING
Attorney General

ALBERT J. LAMA
Chief Deputy Attorney General

January 19, 2012

OPINION
OF
GARY K. KING
Attorney General

Opinion No. 12-02

BY: Stephen A. Vigil
Assistant Attorney General

TO: The Honorable Joni Marie Gutierrez
New Mexico State Representative
Box 842
Mesilla, NM 88046

The Honorable Nancy Rodriguez
New Mexico State Senator
1838 Camino La Canada
Santa Fe, NM 87501

QUESTION:

May an out-of-state public housing authority, or an instrumentality of an out-of-state public housing authority, act as a public housing authority in New Mexico in light of the New Mexico Mortgage Finance Authority Act, NMFA 1978, Chapter 58, Article 18, which designates the New Mexico Mortgage Finance Authority ("MFA") as the single state housing authority in New Mexico?

CONCLUSION:

By statute, MFA is designated as the single state housing authority in New Mexico. An out-of-state public housing authority or instrumentality of an out-of-state public housing authority has no authority to act as a public housing authority within New Mexico.

BACKGROUND:

Our opinion was requested because of the possibility that the U.S. Department of Housing and Urban Development ("HUD") will award the contract for the administration of HUD's Project-Based Section 8 Housing Assistant Payments ("HAP") Contracts Program for the State of New Mexico to a public housing agency incorporated and located out of state, on the premise that the organization will be able to operate as a public housing authority within the state under New Mexico law.

In March 2011, HUD issued an "Invitation for Submission of Applications: Contract Administrators for Project-Based Section 8 Housing Assistance Payments (HAP) Contracts." The Invitation's purpose was to solicit applications from public housing agencies to administer the HAP contracts program in each state. The Invitation was issued pursuant to Section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437f. Since 2000, MFA had been responsible for administering the New Mexico HAP contracts program. However, after reviewing the applications it received in response to the March 2011 Invitation, HUD announced that it would designate Southwestern Housing Compliance Corporation ("SHCC"), an instrumentality of the Housing Authority of Austin, Texas, to be the contracts administrator for New Mexico.

HUD made similar determinations throughout the United States, selecting entities incorporated outside of those states to administer their HAP contracts programs. MFA, along with similarly-situated public housing agencies in other states, protested the procurement process for the HAP contract administrators. HUD subsequently withdrew the contract award but has since indicated that it will commence another bidding process in which it will accept applications from out-of-state bidders if they include a legal opinion that they are eligible to operate as a public housing agency throughout the state for which they are applying.

ANALYSIS:

MFA was created by the New Mexico legislature in 1975 as:

> a public body politic and corporate, separate and apart from the state, constituting a governmental instrumentality ... acting in all respects for the benefit of the people of the state in the performance of essential public functions and ... serving a valid public purpose in improving and otherwise promoting their health, welfare and prosperity....

NMSA 1978, § 58-18-2(F). In 1998, the Legislature consolidated and transferred certain housing programs to the MFA and changed its designation. *See* Laws 1998, ch. 63, § 6. The title of Section 58-18-5.5 of the Mortgage Finance Authority Act ("Act") is: "Additional powers of authority; *authority designated as single state housing authority ...* " (emphasis added). Pursuant to Section 58-18-5.5(A), MFA "is designated as the state housing authority for all purposes." Furthermore, the MFA "shall administer federal and state housing programs and federal tax credit provisions associated with those programs." NMSA 1978, § 58-18-5.5(C). The term "state" is defined as New Mexico. NMSA 1978, § 58-18-13(T). The foregoing provisions make clear that the legislature has designated MFA as the single public housing authority in New Mexico with statewide jurisdiction.[1]

For purposes of the U.S. Housing Act of 1937, a "public housing agency" is defined as: "Any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of public housing." 42 U.S.C. § 1437a(b)(6)(A). Under this definition, an entity must be "authorized" by state law to develop or operate public housing in the state before it can qualify as a public housing agency in that state.[2]

Our review of state law reveals that it does not allow out-of-state entities, including entities such as SHCC that are public housing authorities under the laws of other states, to act as public housing authorities in New Mexico. MFA is the sole entity authorized by the state legislature "to engage in or assist in the development or operation of public housing" throughout the state. As discussed above, the title of Section 58-18-5.5 states that MFA is the single state housing authority and Subsection A formally designates MFA as such. Furthermore, Subsection C clearly indicates that MFA is in charge of administering federal programs, which would include the Section 8 HAP contracts program. Because MFA is statutorily designated as the state's only state housing authority with statewide jurisdiction, and New Mexico law does not otherwise authorize an out-of-

[1] The New Mexico legislature has authorized the creation of other public housing authorities within the state; however, in contrast to MFA, those entities' jurisdictions are limited. *See* Municipal Housing Law, ch. 3, art. 45 1965, as amended through 2009 (authorizing a city or county to create local housing authorities to operate and manage housing projects and affordable housing programs within the city or county); Regional Housing Law, ch. 11, art. 3A (1994, as amended through 2009) (creating regional housing authorities with operations confined to their respective regions).

[2] We believe it goes without saying that a state cannot properly authorize a public housing authority created under that state's law to operate as a public housing authority in another state. Federal law could confer the requisite authority on an out-of-state housing authority but has not done so under the circumstances presented here. *Cf.* 42 U.S.C. § 1437a(b)(6)(B)(iii)(II) (expanding definition of "public housing agency" in the U.S. Housing Act "[f]or purposes of the program for tenant-based assistance under section 8" to include, "notwithstanding any provision of State or local law, a public housing agency for another area that contracts with [HUD] to administer a program for housing assistance under section 8, without regard to any otherwise applicable limitations on its area of operation" when "no public housing agency has been organized or where [HUD] determines that a public housing agency is unwilling or unable to implement a program for tenant-based assistance ... or is not performing effectively ...").

state entity to act as a public housing authority in New Mexico, we conclude that the law necessarily prohibits out-of-state public housing authorities and their instrumentalities from acting as public housing authorities in New Mexico.

GARY K. KING
Attorney General

STEPHEN A. VIGIL
Assistant Attorney General

JOHN R. KROGER
Attorney General

MARY H. WILLIAMS
Deputy Attorney General

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

October 5, 2011

Richard W. Crager, Deputy Director
Oregon Housing and Community
Services Department
725 Summer Street NE, Suite B
Salem, OR 97301-1266

Re: Opinion Request OP-2011-2

Dear Mr. Crager:

You have asked whether a nonprofit corporation with certain characteristics may act as a "public housing agency" in Oregon. Your specific question and our short answer are set forth below, followed by our analysis.

QUESTION PRESENTED

A state or local government outside of Oregon creates a nonprofit corporation to act as an instrumentality of that government. In the state where it is created, that corporation has authority to act as a "public housing agency" as that term is defined in 42 USC §1437a(b)(6). The corporation is authorized to conduct business in Oregon pursuant to ORS 65.714. Does Oregon law authorize the corporation to act as a "public housing agency" within the state of Oregon?

SHORT ANSWER

No.

DISCUSSION

For purposes of the United States Housing Act of 1937, as amended, a "public housing agency" is "any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of public housing." 42 USC §1437a(b)(6)(A). As described in the question, the nonprofit corporation at issue is an instrumentality of a "governmental entity," but not of an Oregon governmental entity. The corporation satisfies the requirements of 42 USC §1437a(b)(6) in the state of its creation, and thus may act as a "public housing agency" within that state.

However, the laws of another state cannot confer authority to exercise Oregon government functions. Only Oregon law can do that. *See Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 US 493, 501, 59 S Ct 629, 83 L Ed 940 (1939) ("[T]he very nature of the federal union of states, to which are reserved some of the attributes of sovereignty,

precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.") Nor do other states' governmental entities possess inherent authority to govern in Oregon. *See Nevada v. Hall*, 440 US 410, 99 S Ct 1182, 59 L Ed2d 416 (1979) (Nevada is not sovereign in California and thus has no inherent sovereign immunity when sued in California courts for its acts within California). Indeed, Oregon government authority exists only where a statutory or constitutional provision expressly grants that authority or necessarily implies it. *See, e.g., Ochoco Construction, Inc. v. Department of Land Conservation and Development*, 295 Or 422, 426-427, 667 P2d 499 (1983) (state agency "has no inherent power, but only such power and authority as has been conferred upon it by its organic legislation") (citing cases); *City of Sandy v. Metro*, 200 Or App 481, 485-486 115 P3d 960 (2005) (validity of a Metro ordinance depends on conclusion that the ordinance is within the authority granted by Metro's charter, which in turn must be within the authority conferred on Metro by Oregon Constitution and statutes); *see also id.* at 495 (noting that the Oregon Constitution is the source of the legislature's generally plenary authority and can impose limits on that power). Thus, although the entity at issue is a governmental entity of an out-of-state government, and can act with the authority of that out-of-state government to the full extent permitted by the laws of the other state, only Oregon laws can give the entity authority to carry out functions of Oregon government. Furthermore, as *Nevada v. Hall* explains, such an entity is generally subject to Oregon's laws when it acts in Oregon, even if it is properly acting as a governmental entity of its origin state.

Authorization to conduct business as a corporation under ORS 65.714 does not constitute authority to act as an Oregon governmental entity. Instead, that provision confers upon a foreign corporation authorized to transact business in Oregon "the same but no greater rights and * * * the same but no greater privileges as, and except as otherwise provided by this chapter * * * the same duties, restrictions, penalties and liabilities now or later imposed on, a domestic corporation of like character." ORS 65.714(1).

As discussed above, a governmental entity of another state does not possess authority to act as an Oregon governmental entity. Thus, a "domestic corporation of like character" to the nonprofit corporation at issue would be a domestic corporation created by an entity lacking Oregon governmental authority. ORS 65.077 provides that the corporate form, by itself, confers only "the same powers as an individual" to carry out the corporation's affairs. Consequently, a governmental entity of another state cannot use the corporate form to confer upon itself the power to act as an Oregon governmental entity. Any Oregon "governmental entity" with "authori[ty] to engage in or assist in the development or operation of public housing" must be specifically authorized by Oregon law.

And in fact, Oregon has enacted specific statutes that authorize particular entities to act as public housing agencies within the meaning of 42 USC §1437a(b)(6)(A). But those statutes apply, by their terms, to Oregon governmental entities at the state and local level.

The "Housing Authorities Law," codified at ORS 456.055 to 456.235, largely governs public housing agencies at the county and municipal level. Specifically, ORS 456.075 provides,

in part, that "[i]n each city, as defined in ORS 456.055, and county there hereby is created a public body corporate and politic to be known as the 'housing authority' of the city or county." A housing authority established under this section cannot "transact any business or exercise its powers until or unless the governing body of the city or the county, by proper resolution, declares that there is need for an authority to function in such city or county." ORS 456.075. ORS 456.120 generally describes the powers granted to a local housing authority; those powers include "all the powers necessary or convenient to carry out and effectuate the purposes of the Housing Authorities Law." Among twenty powers specifically enumerated by ORS 456.120 are the power to "lease or rent any housing, lands, buildings, structures or facilities embraced in any housing project," ORS 456.120(8), and the power to enter into arrangements with other parties to "finance, plan, undertake, construct, acquire, manage or operate a housing project," ORS 456.120(18). ORS 456.145 separately confers the power to utilize eminent domain.

ORS 456.060 circumscribes the geographic area within which a municipal or county "housing authority" may act. Inside of those geographic bounds, the powers granted to the governmental "housing authorities" created by ORS 456.055 to 456.235 qualify them as "public housing agencies" within the meaning of 42 USC §1437a(b)(6)(A). We do not believe it is plausible to infer authority for government entities of other states to operate as public housing authorities throughout Oregon, when Oregon's county and municipal governments are subject to this express geographic limitation.

In addition to these local bodies, the various powers statutorily conferred upon the Oregon Housing and Community Services Department (OHCS) qualify OHCS as a "public housing authority" within the meaning of 42 USC §1437a(b)(6)(A). ORS 456.625 enumerates the powers of OHCS. Subsection (7) of that statute confers broad authority to exercise the power described in 42 USC §1437a(b)(6)(A), including power to make or participate in the making of residential loans to qualified individuals or housing sponsors for acquisition, improvement, rehabilitation and other purposes, to purchase and sell such loans, to foreclose on mortgages and security interests, to acquire or take possession of property subject to such interests and to complete, conserve, improve or otherwise use such property. In addition, ORS 456.625(12) authorizes OHCS to "contract for, act on or perform any other duties that [OHCS] determines necessary or appropriate to carry out housing programs and community services programs." These provisions confer on OHCS authority "to engage in or assist in the development or operation of public housing" within the meaning of 42 USC §1437a(b)(6)(A).

Indeed, ORS 456.550(5) establishes OHCS as Oregon's "central source" for "housing information, planning, educational services and technical assistance and a revolving fund." And ORS 456.559(1)(f) requires OHCS to act as "the central state department to apply for, receive and distribute, on behalf of appropriate state agencies, governmental bodies and public or private housing sponsors in the state, grants, gifts, contributions, loans, credits or assistance from the federal government or any other source for housing programs except when the donor, grantor, or lender of such funds specifically directs some other agency to administer them." Taken together, these various statutes indicate that OHCS is the sole "public housing authority" granted state-wide power by the Oregon Legislative Assembly.

As noted above, the power to act as an Oregon government entity requires constitutional or statutory provisions that expressly confer or necessarily imply such authority. The laws of other states cannot make an entity into an Oregon government entity. Oregon statutes qualify OHCS to operate statewide as a "public housing agency" within the meaning of 42 USC §1437a(b)(6)(A). And each of the "housing authorities" established by ORS 456.075 may operate as a "public housing agency" within its area of operation, provided that the governing body of the relevant locality has issued the required resolution. No Oregon statutes confer similar authority on governmental entities of other states. By itself, the authority to carry on business as a corporation in Oregon merely confers "the same powers as an individual" to carry on a business. The corporate form of the entity in question does not give it Oregon governmental powers.

We conclude that Oregon law does not authorize a nonprofit corporation created by a governmental entity of another state to act as a "public housing authority" within Oregon. That is true even if the laws of the corporation's state of origin would authorize the corporation to fulfill that role in that state. Under Oregon law, only OHCS is a "governmental entity or public body * * * authorized to engage in or assist in the development or operation of public housing" on a statewide basis.

Of course, federal law could authorize entities to act as "public housing agencies" for purposes of federal law, regardless of their authority under the laws of the relevant state. In fact, the relevant federal statute does precisely that under some circumstances related to "the provision of tenant-based assistance" under 42 USC §1437f. One such exception applies to "any * * * private nonprofit entity that * * * was administering any program for tenant-based assistance" as of the effective date of the Quality Housing and Work Responsibility Act of 1998. 42 USC §1437a(b)(6)(B)(ii). Perhaps more telling is 42 USC §1437a(b)(6)(B)(iii)(II). That provision permits "a public housing agency for another area" to act as a "public housing agency," "notwithstanding any provision of State or local law," but only "with respect to any area in which no public housing agency has been organized or where the Secretary determines that a public housing agency is unwilling or unable to implement a program for tenant-based assistance [under] section 1437f of this title, or is not performing effectively." We are informed that the Secretary has not made any such determination regarding the Oregon Department of Housing and Community Services. We are not aware of any basis that would support such a determination by HUD.

Sincerely,

David E. Leith
Associate Attorney General and
Chief Counsel, General Counsel Division

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JOHN R. KROGER
Attorney General

MARY H. WILLIAMS
Deputy Attorney General

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

November 4, 2011

Janet M. Golrick
Acting Deputy Assistant Secretary for Multifamily Housing Programs
United States Department of Housing and Urban Development (HUD)
Washington DC 20410-8000

Re: Clarification of OP-2011-2

Dear Ms. Golrick:

Your October 19, 2011 letter to Margaret S. Van Vliet, Director of the Oregon Housing and Community Services Department (OHCS) indicates that my October 4, 2011 letter to Richard Crager, Deputy Director of OHCS may not have been entirely clear as to the exclusive authority of OHCS to act as a statewide public housing agency in Oregon. I apologize for that, and write to you now for the purpose of clarifying the view my letter was intended to convey.

Succinctly, OHCS is the exclusive statewide public housing agency (PHA) authorized by Oregon law. See my letter of October 4 at 3 ("OHCS is the sole [PHA] granted statewide power by the Oregon Legislative Assembly."). As my letter also notes, authority under Oregon law is necessary in order to act as an Oregon governmental entity, including as a PHA, see pp. 1-2. Accordingly, OHCS is the only state agency authorized to act for the State of Oregon as a PHA qualified to function as a performance-based contract administrator (PBCA) with respect to the U.S. Department of Housing and Urban Development's (HUD's) §8 housing portfolio in this state.

Your letter notes the possibility that another state agency could be authorized by the Oregon Legislative Assembly as a PHA to contract with HUD as a PBCA. Although the legislature would have the authority to create or authorize a different PHA to act in this capacity (either with the Governor's approval or overriding the Governor's veto), the legislature has not done so. OHCS is the only Oregon public body currently delegated such authority by the legislature. Furthermore, the legislature is not scheduled to go into session again until February of next year. When it does convene, we see no reason at all to expect that it would change OHCS' current status as the sole statewide PHA.

Your letter also notes that OHCS possesses exclusive authority to receive "grants, gifts, contributions, loans, credits or assistance from the federal government or any other source for housing programs except when the donor, grantor, or lender of such funds specifically directs some other agency to administer them." ORS 456.559(1)(f) (emphasis added), cited in Letter of October 19 at 1. I included the foregoing statutory reference in my previous opinion letter as an

1162 Court Street NE, Salem, OR 97301-4096
Telephone: (503) 947-4342 Fax: (503) 378-3784 TTY: (800) 735-2900 www.doj.state.or.us

example of OHCS being tasked by the legislature as the central coordinating entity in Oregon for housing issues – consistent with its designation as the state's only statewide PHA. Letter of October 4 at 3. I did not mean to suggest that this statutory provision was an exception to the opinion. The referenced statute only addresses the authority of OHCS to receive and administer federal or other housing assistance received by the state. This primary authority to receive and administer housing assistance is distinct from the exclusive authority possessed by OHCS to contract with HUD on behalf of the State of Oregon as a PBCA. *Id., citing, e.g.,* ORS 456.625 (7) and (12). As we have previously clarified, no agency other than OHCS is legislatively authorized as a statewide PHA able to contract for Oregon with HUD as a PBCA. And, given the language in 42 U.S.C. § 1437f(b)(1), it would not appear that HUD has authority to designate a different PBCA for its Oregon § 8 portfolio unless OHCS first is unwilling or unable to act in that capacity. Obviously, that is not the case given OHCS' demonstrated ability as Oregon's current PBCA and its expressed willingness to continue in that role.

I hope that this clarifies our opinion that OHCS is the only entity authorized by Oregon law to act as a statewide PHA and thereby qualified to act for Oregon as a PBCA.

Sincerely,

David E. Leith
Associate Attorney General and
Chief General Counsel
General Counsel Division

DEL:naw/3077130
c: Richard Crager, OHCS Deputy Director

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

LINDA L. KELLY
ATTORNEY GENERAL

April 19, 2012

15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1111

Mr. Kerry E. Hickman, Acting Director
Office of Housing Assistance and Contract Administration Oversight
Multifamily Housing Program
U.S. Department of Housing and Urban Development
451 Seventh Street SW, Room 6151
Washington, DC 20410

Re: Pennsylvania Law - Statewide Housing Authority and Administration of Project-based Contracts for HUD Section 8 Rental Subsidies

Dear Mr. Hickman:

Please be advised that the Pennsylvania Housing Finance Agency (PHFA) has requested that our office review Pennsylvania law and provide your office with our conclusions in regard to the standing of PHFA as the exclusive state-wide public housing agency within the Commonwealth of Pennsylvania.

Specifically, we have reviewed this office's 1977 Opinion (the "1977 Opinion") as to the Pennsylvania Housing Finance Agency's status as a public housing agency. It is our opinion that the 1977 Opinion remains valid for the reasons set forth herein.

We have further reviewed whether the Pennsylvania Housing Finance Agency is the only agency with the exclusive authority to administer a statewide Project-Based Section 8 contract. The Pennsylvania Housing Finance Agency is the only entity, within the Commonwealth of Pennsylvania, with the exclusive authority to administer a statewide Project-Based Section 8 contract.

In addition, we have reviewed whether an out-of-state entity may serve as a public housing authority in the Commonwealth of Pennsylvania. It is our belief, and you are advised, that an out-of-state entity is not enabled by state law to serve as a "public housing authority" under Pennsylvania law.

In our 1977 Opinion, we determined that PHFA is a public housing agency pursuant to the Housing Act of 1937, 42 U.S.C. § 1437a(6) (the "Housing Act").

The Pennsylvania Housing Finance Agency ("PHFA") is a public corporation and government instrumentality of the Commonwealth of Pennsylvania existing pursuant to the provisions of the above-cited Housing Finance Agency Law, Act of Dec. 3, 1959, P.L.1688, No. 621, as amended (35 P.S. Section 1680.101 *et seq.*) (the "Housing Finance Agency Law"). PHFA was created in 1959, and began its corporate existence after passage of Act 5 of 1972. PHFA exists, *inter alia*, to address public health and safety issues through the operation and administration of specialized programs for the financing of both single family and residential rental housing for persons and families of low and moderate income. There has been no derogation of the power of authority of PHFA by legislation, by regulation or by judicial action, since the issuance of our original Opinion; therefore, PHFA maintains the requisite power and authority pursuant to state law to qualify as a public housing agency. The 1977 Opinion remains valid, based upon the Housing Act and the Housing Finance Agency Law.

We note that the Housing Act has been amended to expand the scope of powers. We have reviewed the amendments that have occurred since the issuance of the 1977 Opinion, and have reviewed the Opinion of Chief Counsel for the Pennsylvania Housing Finance Agency. We concur that PHFA has the powers set forth within the meaning of section 3(b)(6)(A) under Pennsylvania law. Further, we concur that the jurisdiction of the Pennsylvania Housing Finance Agency encompasses the entire Commonwealth.

Local housing authorities in the Commonwealth of Pennsylvania are also creatures of state law. The powers and operations of these entities is set forth in 35 P.S. §§ 1541 *et seq.* (1937, May 28, P.L. § 1 *et seq*, referred to as the "Housing Authorities Law"). After a thorough examination of the Housing Finance Agency Law, the Housing Act and the Housing Authorities Law, we have concluded that a local housing authority's jurisdiction is limited to its field of operation[1].

In order for a "public housing agency" to be "authorized to engage in or assist in the development or operation of public housing" it must satisfy Pennsylvania's statutory requirements. In the Commonwealth, the enabling legislation that creates local housing authorities provides, in pertinent part, that a "housing authority" is "a public body and a body corporate and politic" and one may be established for each city and one for each county within Pennsylvania. (35 P.S. § 1544.) A housing authority is not able to transact business or "become operative" until it has satisfied the statutory requirements. The housing authority law specifically limits the authority of a local housing entity to act within its territorial boundaries because...."The governing body of any city or county may find and declare by proper resolution that there is need for an Authority to function within the territorial limits of said city or county." 35 P.S. § 1544 (b).

A housing authority may only be formed if the governing body of any city or county in Pennsylvania or the Governor of Pennsylvania determines that there is such a need for a housing authority. No more than one housing authority for each city and county may be established. Following the declaration of a need for a housing authority, the governing body or the Governor shall

[1] Section 1543(g) defines "Field of Operation", in pertinent part, as-"The area within the territorial boundaries of the city of or county for which the particular housing authority is created..." 35 P.S. 1543(g).

file a certificate with the Department of State. The certificate "shall be conclusive proof" that the housing authority was "properly established." See 35 P.S. § 1544.

The Pennsylvania General Assembly's creation of PHFA evidences that it was intended to serve as the sole housing authority with statewide jurisdiction. In 1973, in response to a constitutional challenge to PHFA's existence, the Supreme Court of Pennsylvania determined that PHFA is "a state-wide government instrumentality." *Johnson v. PHFA*, 453 Pa. 329, 309 A.2d 528 (1973 Pa. Lexis 681). The authority of a local housing authority is limited to the city or county it was created to serve. PHFA does not share the same restrictions. PHFA's enabling statute does not limit its authority to the city and county of its incorporation.

PHFA's mission is to help alleviate the hardships "which results from insufficient production of private homes and of rental housing for persons and families of low and moderate income." 35 P.S. § 1680.102. The General Assembly bestowed upon PHFA broad powers to *"promote the health, safety and welfare"* of the citizens of the Commonwealth. These powers include the authority to act throughout the state, and these powers include all things necessary to administer the Project-Based Section 8 contract throughout the Commonwealth. It is our opinion, and you are advised, that PHFA is the only entity with the power to serve as a statewide public housing authority.

Once a housing authority is established, it is vested with substantial powers and responsibilities. Most notably, it is charged with promoting the health and welfare of its residents. A housing authority may also cooperate with and act as an agent of the Federal Government for the public purposes related to the acquisition, construction, operation or management of a housing project, *see* 35 P.S. § 1544(g), to acquire property by eminent domain, *see* 35 P.S. § 1544(n), make recommendations about a city or municipalities plan within its jurisdiction, *see* 35 P.S. § 1544(c). Certain housing authorities are also able to appoint police officers, *see* 35 P.S. § 1544(g). Furthermore, Pennsylvania courts have recognized housing authorities as Commonwealth agencies for purposes of sovereign immunity. *See*, *Crosby v.* Kotch, 135 Pa. Commw. 470, 580 A. 2d 1191 (Pa. Cmwlth. 1990) (holding that a housing authority was a Commonwealth agency rather than a local agency).

In sum, Pennsylvania's Housing Authority Law provides "[e]ach Authority shall transact no business or otherwise become operative until and unless" they have been properly established by the jurisdiction that they serve. Pennsylvania courts have recognized a housing authority to be a Commonwealth agency, for purposes of sovereign immunity. By law, Pennsylvania's housing authorities are vested with substantial powers and responsibilities. Taken together, these factors do not support recognition of an out-of-state entity as a housing authority within the Commonwealth of Pennsylvania.

It is axiomatic that an out-of-state entity cannot lawfully function as a housing authority within the Commonwealth. A housing authority may only be formed if the governing body of any city or county in Pennsylvania or the Governor of Pennsylvania determines that there is such a need for a housing authority. No more than one housing authority for each city and county may be established. Following the declaration of a need for a housing authority, the governing body or the Governor shall file a certificate with the Department of State, and the certificate "shall be conclusive proof" that the

housing authority was "properly established." See 35 P.S. § 1544. An out-of-state agency seeking to serve as the administrator for Pennsylvania cannot be considered a "public housing agency" under the Housing Act, since it cannot be a legally recognized housing authority within the Commonwealth of Pennsylvania.

In conclusion, it is our opinion that (1) the Pennsylvania Housing Finance Agency remains a public housing agency as evidenced by our October 12, 1977 opinion; thus, it is able to administer the Project-Based Section 8 contract; (2) it is the only housing authority, in Pennsylvania, with state-wide jurisdiction; and (3) an out-of-state entity is not a "housing authority" of the Commonwealth.

Sincerely yours,

Robert A. Mulle
Chief Deputy Attorney General
Office of Civil Law

RAM:mlm
SR-38310-RJ6S

State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL
150 South Main Street • Providence, RI 02903
(401) 274-4400 - TDD (401) 453-0410

Peter F. Kilmartin, Attorney General

June 7, 2012

Michael V. Milito, Esq.
Deputy Assistant Director for
Law and Human Resources
Rhode Island Housing and Mortgage Finance Corporation
44 Washington Street
Providence, Rhode Island 02903

Re: Advisory Opinion – Authority to Act as Public Housing Authority in the State of Rhode Island

Dear Mr. Milito:

I am writing in response to your request on behalf of Rhode Island Housing and Mortgage Finance Corporation ("Rhode Island Housing") for an opinion from the Attorney General on the questions of 1) whether Rhode Island Housing is authorized to serve as the Performance-Based Contract Administrator ("PBCA") for the State of Rhode Island, and 2) whether an entity not formed pursuant to Chapter 25 of Title 45 ("City Housing Authorities") or Chapter 26 of Title 45 ("Town Housing Authorities") constitutes a "public housing authority" under Rhode Island law.

For the reasons set forth below it is my opinion that 1) Rhode Island Housing is authorized to serve as a PBCA for the State of Rhode Island, and 2) any other entity not formed in accordance with Chapter 25 or Chapter 26 of Title 45 of the General Laws does not constitute, and is not authorized to act as, a "public housing authority" under Rhode Island law.

In reaching these opinions I have had the opportunity to review, among other materials, the PBCA Invitation, and the United States Housing Act of 1937 ("1937 Act" found at 42 U.S.C. 1437 et seq.). I have also specifically reviewed Section 2.2 of the PBCA invitation, entitled, "Statutory Definition of 'Public Housing Agency' and Related Statutory Definitions."

A. Rhode Island Housing is Authorized to Act as a "Public Housing Authority"

It is my understanding that HUD may only enter into a Performance Based Annual Contributions Contract ("ACC") with a legal entity that qualifies as a "Public Housing Authority" under the 1937 Act. Within that act, a public housing authority is defined as a, "State, county,

municipality or other governmental entity or public body (or instrumentality thereof) which is authorized to engage in or assist in the development of public housing." 42 U.S.C. 1437a(b)(6).

The Rhode Island Housing and Mortgage Finance Corporation was established by Chapter 262 of the Public Laws of 1973, and is currently codified at Chapter 55 of Title 42 of the General Laws of Rhode Island. Shortly after its enactment, the Rhode Island Supreme Court opined confirming the public purpose of Rhode Island Housing in a case entitled, Opinion to the Governor, 112 R.I. 151, 308 A.2d 809 (1973).

The legislation established Rhode Island Housing as a public corporation of the state, having a separate and distinct legal existence from the state but "exercising public and essential governmental functions" to carry out the act. Section 42-55-4, General Laws of Rhode Island, 1956, as amended. The exercise of those functions, "shall be deemed and held to be the performance of an essential governmental function. Id.

Although the act establishing Rhode Island Housing does not explicitly mention "public housing," the broad definition of "housing development" within the act, found at Section 42-55-3 of the General Laws of Rhode Island, is consistent with and encompasses development that is considered "public housing" under the 1937 Act.

In addition, the act specifically grants to Rhode Island Housing the power to carry out functions that are regularly conducted by public housing authorities. Specifically, the act provides that Rhode Island Housing shall have the power "[t]o administer and manage Section 8 tenant based certificate programs and Section 8 rental voucher programs in those municipalities that do not have a local housing authority and in those municipalities who local housing authority elects to contract with Rhode Island Housing Mortgage and Financing Corporation." Section 42-55-5(35), General Laws of Rhode Island, 1956, as amended.

For the foregoing reasons, it is my opinion that Rhode Island Housing and Mortgage Finance Corporation qualifies as a "public housing authority" within the meaning of 42 U.S.C. 1437a(b)(6) with authority to operate throughout the State of Rhode Island.

B. Entities Not Created Pursuant to Chapter 25 or Chapter 26 of Title 45 of the General Laws Are Not "Public Housing Authorities" under Rhode Island Law

It is my understanding that the Annual Contributions Contract to be awarded in this instance may only be awarded to a "public housing agency" pursuant to 42 U.S.C. 1437f(b)(1) that is authorized to act as a public housing agency throughout the state in accordance with the laws of the state. The PBCA invitation notes at page 6, "[a] public housing agency is a creature of state law."

Rhode Island law is quite specific with regard to what constitutes a "public housing agency." The General Laws of Rhode Island address "City Housing Authorities" in Chapter 25 of Title 45, and "Town Housing Authorities" in Chapter 26 of the same title. Within these chapters, an "authority" or "housing authority" is a specifically defined entity, defined as "a public body and a body corporate and politic, organized in accordance with the provisions of chapters 25 and 26 of this title for the purposes, with the powers, and subject to the restrictions established in chapters 25 and 26 of this title."

The Rhode Island Supreme Court has affirmed the public purpose of a housing authority as early as 1953, when, in the case of State ex re. Costello v. Powers, 80 R.I. 390, 97 A.2d 584 (1953), the Court stated:

"It appears that the housing authority of the city of Pawtucket when set up in accordance with the provisions of G.L.1938, chap. 344, § 4, 'shall constitute a public body and a body corporate and politic' and be issued a certificate of incorporation. Such body corporate is made up of five commissioners, three of whom constitute a quorum. No commissioner individually has any power to bind the housing authority. Its acts are those of the body corporate. The powers of such housing authority in providing in the public interest safe and sanitary dwelling accommodations for persons of low income include among other things authority to borrow money from the federal government and to enter into contracts with it in aid of the purposes of the housing authority. It also exercises some of its powers as a representative of the city government and other powers as an agent of the federal government."

In the case of Parent v. Woonsocket Housing Authority, 87 R.I. 444, 143 A.2d 146 (1958), which concerned an employment contract which had allegedly been breached by the defendant Housing Authority, the Supreme Court stated:

"However, the services which these authorities render are impressed with a public character to such an extent that we think it is a matter of public policy that they be bound in some particulars by the rules which govern the activities of municipal corporations and departments thereof. The public character of such authorities was recognized in Opinion of the Justices, 322 Mass. 745, 751, 78 N.E.2d 197, 201, where the court stated: 'But the housing authorities are not corporations 'privately owned and managed.' On the contrary, they are publicly owned and managed.' In State ex rel. Costello v. Powers, 80 R.I. 390, at page 396, 97 A.2d 584, 586, this court in referring to the character of the Pawtucket housing authority said: 'It also exercises some of its powers as a representative of the city government and other powers as an agent of the federal government.'

More recently, the Supreme Court again considered the nature of a housing authority under Rhode Island law when reviewing an eviction action brought by the Woonsocket Housing

Authority in the case of Housing Authority of the City of Woonsocket v. Fetzik, 110 R.I. 26, 289 A.2d 658 (1972). The Court noted:

"....a housing authority is one of a large class of corporations created by the government to undertake public enterprises in which the public interests are involved to such an extent as to justify conferring upon such corporations important governmental privileges and powers, such as eminent domain, but which are not created for political purposes and which are not instruments of the government created for its own uses or subject to its direct control.

A housing authority exercises some of its powers as a representative of the city government and other powers as an agent of the federal government, State ex rel. Costello v. Powers, 80 R.I. 390, 97 A.2d 584 (1953), and, as we pointed out in Parent v. Woonsocket Housing Authority, supra, a housing authority has a dual nature which partakes of a public as well as a private character."

For the foregoing reasons, it is my opinion that an entity not created pursuant to Chapter 25 or Chapter 26 of Title 45 of the General Laws, does not qualify as a "public housing authority" under Rhode Island Law. The term "public housing authority" has a specific statutory meaning under Rhode Island law that precludes its application to any other entity, including instrumentalities of in-state or out-of-state entities, not specifically organized within the applicable sections of the Rhode Island General laws. Moreover, any properly constituted city housing authority or town housing authority does not have authority to operate as a public housing authority throughout the State of Rhode Island without first meeting the requirements of R.I.G.L. §45-25-8 or R.I.G.L. §45-26-6, respectively.

Very truly yours,

Peter F. Kilmartin
Attorney General

By: 
Gerald J. Coyne
Deputy Attorney General

2012 WL 628475 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
February 21, 2012

*1 Tracey C. Easton, Esquire
General Counsel
S.C. State Housing Finance and Development Authority
300-C Outlet Pointe Blvd.
Columbia, SC 29210

Dear Ms. Easton:
We received your letter on behalf of the South Carolina State Housing Finance and Development Authority (the "Authority"). By way of background, you state that the Authority is currently the Contract Administrator for Project-Based Section 8 Housing Assistance Payments Contracts (the "Contract Administrator Program") for South Carolina, and that the Contract Administrator Program is administered pursuant to an agreement with the United States Department of Housing and Urban Development ("HUD"). You inform us that HUD recently issued an Invitation of Applications: Contract Administrators For Project-Based Section 8 Housing Assistance Payments Contracts (the "Invitation"). Pursuant to HUD's Invitation, the Authority was required to submit a Reasoned Legal Opinion, including a statement establishing the Authority's authorization to act state-wide. You state the Authority is informed and believes that two local housing authorities have also applied for consideration under the Invitation. You therefore request an opinion of this office to address the authority of a local housing authority to act statewide.

Law/Analysis

In reviewing your question, it is imperative that there be compliance with the rules of statutory construction. South Carolina Coastal Conservation League v. South Carolina Dept. of Health and Environmental Control, 390 S.C. 418, 702 S.E.2d 246 (2010). Statutory interpretation is a question of law. City of Newberry v. Newberry Elec. Co-op., Inc., 387 S.C. 254, 692 S.E.2d 510 (2010). The primary rule of statutory construction is to ascertain and give effect to the intent of the Legislature. Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000); Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 476 S.E.2d 690 (1996). The best evidence of intent is in the statute itself. Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their plain and ordinary meaning. Id.

If the [L]egislature's intent is clearly apparent from the statutory language, a court may not embark upon a search for it outside the statute. When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the [L]egislature's language, and there is no need to resort to statutory interpretation or legislative intent to determine its meaning.

While it is true that the purpose of an enactment will prevail over the literal import of the statute, this does not mean that [a] Court can completely rewrite a plain statute.

Hodges, 533 S.E.2d at 582. What the Legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the Legislature. Media General Communications, Inc. v. South Carolina Dept. of Revenue, 388 S.C. 138, 694 S.E.2d 525 (2010); Wade v. State, 348 S.C. 255, 559 S.E.2d 843 (2002); see also Jones v. South Carolina State Highway Department, 247 S.C. 132, 146 S.E. 2d 166, 168 (1966) ["There is no safer nor better rule of interpretation then when language is clear and unambiguous it must be held to mean what it plainly states"].

*2 South Carolina's "Housing Authorities Law" is found in Title 31, Chapters 3 and 11, of the South Carolina Code. In S.C. Code Ann. § 31-3-30, the Legislature states:

[i]t is hereby declared as a matter of legislative determination that (1) in order to promote and protect the health, safety, morals and welfare of the public, it is necessary in the public interest to provide for the creation of public corporate bodies to be known as housing authorities and to confer upon and vest in such housing authorities all powers necessary or appropriate in order that they may engage in low-cost housing and slum clearance projects and (b) the powers herein conferred upon the housing authorities, including the power to acquire property, to remove unsanitary or substandard conditions, to construct and operate

housing accommodations and to borrow, expend, lend and repay moneys for the purposes herein set forth, are public objects essential to the public interest.

Separate statutes in Chapter 3 of Title 31 govern the creation of city, county and regional housing authorities. When determining the jurisdiction of a housing authority, the language of the enabling statute is a good starting point. Section 31-3-310 provides for the creation of a city housing authority. Such housing authority has no operational existence or power until the city council determines that a housing authority is needed and vote to create the housing authority. See § 31-3-320. Clearly, city council only has jurisdiction to act on matters related to the city which elected or appointed them. Columbia, for example, could not vote to create a housing authority in West Columbia. In addition to provisions regarding the creation of a city housing authority, there are specific references to jurisdictional limits. For example, § 31-3-390 provides that "[t]he territorial jurisdiction of each authority, except as otherwise specially provided, shall be coterminous with the boundaries of the city creating the authority unless this territory is extended by the director [*i.e.*, the Secretary of Commerce]."1 The territorial jurisdiction of a city housing authority may be extended to areas contiguous to those being served by a housing authority (*i.e.*, abutting the city limits) provided such extension "does not conflict with any other housing authority." Section 31-3-400 provides that a housing authority of one city may exercise any or all of its powers within the boundaries of another city provided certain requirements set forth in that provision are met.2 In previous opinions of this office we advised that this provision calls for an extraterritorial exercise of powers, but does not extend the actual jurisdiction of a city housing authority into another municipality. See Ops. S.C. Atty. Gen., December 21, 1988; March 11, 1977. Also, § § 31-3-1310 *et seq.* provide for the consolidation of two or more city housing authorities, whether or not they are contiguous, so long as the requirements spelled out in § 31-3-320 are met. If a consolidated housing authority is created, it acts in place of existing housing authorities. See § 31-3-1320. Territorial jurisdiction for consolidated housing authorities is provided for in § 31-3-1350 to "include all of the territory within the boundaries of each municipality" in the consolidated housing authority. Finally, § 31-3-750 provides that the director may extend the territorial jurisdiction of a city housing authority into contiguous county property, "including territory included within the territorial jurisdiction of the housing authority of a county."

*3 Sections 31-3-710 *et seq.* establish the mechanism for the creation of a county housing authority. Section 31-3-720 requires a resolution of the county's legislative delegation in the same manner as that provided in § 31-3-320 for a city housing authority. Jurisdiction of a county housing authority is provided in § 31-3-750, which states: "[t]he territorial jurisdiction of a housing authority of a county shall be coterminous with the boundaries of the county in which such authority is situated but shall not include that portion of the county within the territorial jurisdiction of any housing authority of a city...." Section 31-3-760 provides the mechanism for a city housing authority to come within the territorial jurisdiction of a county housing authority, "if a resolution is adopted by the council of the city, and also by the housing authority of the city if it shall have been theretofore established, declaring, as provided in § 31-3-400, that there is a need for the county housing authority to exercise its powers within such city." Therefore, a county housing authority could be created and, with the cooperation of the involved municipalities and/or city housing authorities, the jurisdiction of a county housing authority may be extended county-wide. Sections 31-3-910 *et seq.* provide authority for the creation of regional housing authorities, "[i]f the legislative delegation of each of two or more contiguous counties by resolution declares that there is a need for one housing authority to be created for all of such counties to exercise in such counties the powers and other functions prescribed for a regional housing authority." If a regional housing authority is created, it acts in place of existing housing authorities. See § 31-3-910.The jurisdiction of a regional housing authority is provided to include, "except as otherwise provided in this chapter and Chapter 11, all of the counties for which such regional housing authority is created and established." See § 31-3-1010. However, a regional housing authority's area of operation does not include any portion of a county within the territorial boundaries of any city, unless the requirements as provided in § 31-3-400 are met. In addition, the jurisdiction of a regional housing authority may be increased to include one or more contiguous counties, provided certain requirements are met. Section 31-3-1020.3

By setting out the mechanisms for creation of municipal, county, and regional housing authorities, the Legislature has clearly defined and limited the service areas of such housing authorities. Otherwise, there would be no need for separate statutory provisions for their creation and specific limits to their areas of operation. The Legislature thus clearly intended these housing authorities to be local to the specific geographic area in which they operate.

In addition, the general provisions of the "Housing Authorities Law" make reference to jurisdictional limits. Section 31-3-40 provides authority for enlarging a local housing authority's jurisdiction by cooperative agreement between local authorities. It states:

*4 [a]ny two or more housing authorities may join or cooperate with one another in the exercise, either jointly or otherwise, of any or all of their powers for the purpose of financing (including the issuance of bonds, notes or other obligations and giving security therefor), planning, undertaking, owning, constructing, operating or contracting with respect to a housing project

located within the territorial jurisdiction or area of operation of any one or more of such authorities. For such purpose any authority may by resolution prescribe and authorize any other housing authority or authorities so joining or cooperating with it to act on its behalf with respect to any or all of such powers. Any authorities joining or cooperating with one another may by resolution appoint from among the commissioners of such authorities an executive committee with full power to act on behalf of such authorities with respect to any or all of their powers, as prescribed by resolutions of such authorities.

Obviously, such a general grant of power would not be necessary if the jurisdiction of a local housing authority extended beyond the boundaries of the municipality, county, or region in which it is created.

Further, we note that § 31-3-450, entitled "Specific powers with respect to projects, planning, and the like," states, in pertinent part, that a city housing authority has power to "investigate into living and housing conditions within its territorial limits and enter upon any building or property in order to conduct investigations or make surveys; to determine where unsanitary or substandard conditions exist within such limits; ..." [Emphasis added]. A consolidated housing authority, "within the area of operation of such consolidated house authority," has the same powers as those provided for other housing authorities. See § 31-3-1360. Likewise, § 31-3-730 provides that county housing authorities "shall, within their territorial jurisdiction as herein defined, have all of the functions, rights, powers, duties and liabilities provided in this chapter and Chapter 11 for housing authorities in cities, and the provisions of this chapter and Chapter 11 shall, within the territorial jurisdiction of such housing authorities of the counties, apply to the housing authorities of the counties in the same manner and to the same extent as this chapter and Chapter 11 applies to the housing authorities created in cities." [[Emphasis added]. These provisions further make it clear to us that the Legislature provided for limits to the jurisdictional boundaries of local housing authorities.

With these jurisdictional limitations in mind, we note that the Legislature has provided for statewide jurisdiction of the Authority. The South Carolina State Housing Finance and Development Authority Act of 1977 (the "Act") expanded the powers of the Authority. See § § 31-13-10 *et seq.* The governing body of the Authority is the Board of Commissioners ("Board"), whose members are appointed by the Governor, with the advice and consent of the Senate. See Section 31-13-30. In addition to the powers conferred by the Act, the Authority and its Board have the same functions, rights, powers, duties, privileges, immunities and limitations as those provided for cities, counties, or regional housing authorities created in Chapter 3 of Title 31. See 31-13-50. Importantly, the Authority is expressly authorized in § 31-13-60 to "conduct its operations in any or all of the counties of the State." The Authority may also operate in any municipality. See Op. S.C. Atty. Gen., January 6, 1972; see also § 31-13-190 ["In addition to all other powers, functions, rights, duties and privileges vested in the Authority ... the Authority may exercise all powers necessary to carry out its functions in any county or municipality and, without limitation, may exercise any of the following powers: ... acquire, own, and operate rental projects" under certain terms and conditions]. Section 31-13-60 specifies the procedures necessary for the Authority to act within the political boundaries of a county or city. If an existing housing authority is operating in a county or city where the Authority determines a need for additional housing exists, then the Authority shall advise the housing authority involved. If the Authority fails to receive appropriate plans by the housing authority involved to meet the housing need within 60 days, then the Authority may operate in the county after written approval from the governing body.

Conclusion

*5 The Housing Authorities Law governs public housing authorities at the local level. The Legislature has specifically circumscribed the geographic area within which a city, county or regional housing authority may act. See Op. S.C. Atty. Gen., March 2, 1978 [stating that a housing authority can only operate in its specific geographic area].These statutory provisions that prescribe the territorial jurisdiction of local housing authorities define and limit the service areas of such authorities, except in limited circumstances where the jurisdiction of a housing authority has been extended in the discretion of the director and by proper resolution of the governing body where such administration would occur that there is need for the housing authority to extend its functions therein. See Op. S.C. Atty. Gen., October 4, 1988 [[advising that, although State law limits the service areas of local housing authorities, the director may adjust or modify the extra-territorial boundaries of a housing authority to best serve the needs of the public]. In our opinion, it is not plausible to infer that local housing authorities may operate state-wide, particularly where their jurisdiction is subject to strict statutory limitations. Conversely, the Authority has express statutory authority to act state-wide. See Op. S.C. Atty. Gen., January 6, 1972 [stating the former State Housing Authority is given authority to operate within the political jurisdiction of any county requesting its services].

Lastly, as we have stated in previous opinions, this office is not authorized to make factual determinations in a legal opinion. In an opinion dated February 26, 2001, we explained:

[b]ecause this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions. Unlike a fact-finding body such as a legislative committee, an administrative agency

or a court, we do not possess the necessary fact-finding authority and resources required to adequately determine ... factual questions.

Thus, while we may offer an opinion as to the jurisdiction of housing authorities under State law, we believe that HUD is in a better position to decide whether or not a housing authority may be considered under the Invitation.

If you have any further questions, please advise.
Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:
Robert D. Cook
Deputy Attorney General

Footnotes

1 Pursuant to § 31-3-20(1) and for purposes of Chapters 3 and 11, the term "director" means the Secretary of Commerce.

2 Pursuant to § 31-3-400, the council of the municipality in which the city housing authority is to exercise its power, and any existing housing authority of such municipality, must adopt a resolution "declaring that there is a need for the [city] housing authority ... to exercise its powers within such municipality."

3 The area of operation of a regional housing authority may be decreased if a resolution is adopted by the legislative delegation of each of the counties that there is a need to exclude a county or counties from the regional authority. See § 31-3-1060. A county may also withdraw from a regional housing authority under certain conditions. See § 31-3-1090.

End of Document

STATE OF TENNESSEE

Office of the Attorney General

ROBERT E. COOPER, JR.
ATTORNEY GENERAL AND REPORTER

CORDELL HULL AND JOHN SEVIER STATE OFFICE BUILDINGS

MAILING ADDRESS
P.O. BOX 20207
NASHVILLE, TN 37202

LUCY HONEY HAYNES
CHIEF DEPUTY ATTORNEY GENERAL

LAWRENCE HARRINGTON
CHIEF POLICY DEPUTY

BILL YOUNG
SOLICITOR GENERAL

TELEPHONE (615) 741-3491
FACSIMILE (615) 741-2009

February 29, 2012

Ted R. Fellman, Executive Director
Tennessee Housing Development Agency
404 James Robertson Parkway, Suite 1200
Nashville, TN 37243-0900

Dear Mr. Fellman:

In response to your request, attached is opinion number 12-25 . If you have further questions or comments, please contact this Office.

Sincerely,

ROBERT E. COOPER, JR.
Attorney General and Reporter

Enclosure

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
P.O. BOX 20207
NASHVILLE, TENNESSEE 37202

February 29, 2012

Opinion No. 12-25

Administration of Project-Based Section 8 Housing Assistance Payments Contracts

QUESTION

Is the Tennessee Housing Development Agency the only agency authorized by Tennessee law to be the administrator of Project-Based Section 8 Housing Assistance Payments contracts for the State of Tennessee?

OPINION

Yes. The General Assembly has created no entity other than the Tennessee Housing Development Agency with the statutory authority to administer a state-wide Project-Based Section 8 contract.

ANALYSIS

The Project-Based Section 8 Housing Assistance Payments program was created by the Housing and Community Development Act of 1974.[1] The Housing Assistance Payments program is a rent subsidy program that assists eligible low income families in obtaining decent, safe, and sanitary housing. Families receive the benefit of a rent subsidy, known as a housing assistance payment, equal to the difference between their share of the rent and the rent charged by the owner. Owners, who may be public or private, receive the housing assistance payments directly from the United States Department of Housing and Urban Development ("HUD") or one of its performance-based contract administrators. *See* 42 U.S.C. § 1437f.

In August of 2000, HUD awarded the Tennessee Housing Development Agency ("THDA") with a Performance-Based Annual Contributions Contract for oversight of properties with Section 8 Housing Assistance Payments contracts. Pursuant to this contract, THDA has continuously served as a performance-based contract administrator for HUD, overseeing Section

[1] "Section 8" refers to Section 8 of the United States Housing Act of 1937, which was added by the Housing and Community Development Act of 1974, Pub.L. No. 93–383, § 201(a), 88 Stat. 633, 662–66 (codified as amended at 42 U.S.C. § 1437(f)). Section 8 housing assistance may be either "project-based" or "tenant-based." 24 C.F.R. § 982.1(b)(1). Project-based assistance is appurtenant to specific housing units, pursuant to which the federal government provides rental assistance payments to unit owners on behalf of low income tenants in those units. *Id.* Tenant-based assistance, on the other hand, is appurtenant to the tenant, pursuant to which the tenant may retain a rental subsidy when he or she moves to another Section 8 housing unit. *See* 42 U.S.C. § 1437f(o), (r); 24 C.F.R. §§ 982.1(b)(1), 982.314, 982.353, 982.355.

8 Housing Assistance Payments contracts appurtenant to approximately 400 properties located throughout Tennessee. *See* http://www.thda.org/s8ca/cacover.html.

Currently, HUD is engaging in a new competitive process to select performance based-contract administrators for its Housing Assistance Payments contracts in each state. On March 23, 2011, HUD issued an Invitation for Submission of Applications wherein it announced that it would select one administrator for each state, other than California. *See* Invitation for Submission of Applications, *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=invitationforappsfinal.pdf.

The Invitation states that the successful applicant for each state will enter into a single Performance-Based Annual Contributions Contract ("ACC") with HUD. *Id.* at 3 The principal tasks to be performed under the contract include, but are not limited to, the following:

- Monitoring compliance by project owners with their obligation to provide decent, safe, and sanitary housing to assisted residents;
- Paying property owners accurately and timely;
- Accurately and timely submitting required documents to HUD (or a HUD designated agent); and
- Complying with applicable Federal law and HUD regulations and requirements, as they exist at the time of ACC execution and as amended from time to time.

Id. at 4.

The Invitation further provides that the successful applicant must perform certain "Performance Based Tasks" set forth in the ACC. *See* Performance-Based Annual Contributions Contract, § 1, Exhibit A § 3, *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=accfinal.pdf.

Importantly, the Invitation seeks applications from legally qualified "public housing agencies," consistent with 42 U.S.C. § 1437f, which provides in pertinent part:

> The Secretary is authorized to enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners of existing dwelling units in accordance with this section. In areas where no public housing agency has been organized or where the Secretary determines that a public housing agency is unable to implement the provisions of this section, the Secretary is authorized to enter into such contracts and to perform the other functions assigned to a public housing agency by this section.

42 U.S.C. § 1437f(b)(1).

The term "public housing agency" is defined in pertinent part as follows:

> Except as provided in subparagraph (B),[2] the term "public housing agency" means any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is *authorized* to engage in or assist in the development or operation[3] of public housing.

42 U.S.C. § 1437a(b)(6)(A)(emphasis added).

Based on the information provided with this opinion request, HUD received protests in several states regarding whether certain applicants were legally authorized "public housing agencies" eligible to be awarded the ACC proposed to be let by the Invitation. In light of these protests, HUD has elected to engage in a new competitive process in those states where more than one application was received. Since Tennessee is one of the states in which HUD will be engaging in a new competitive process, the question posed is whether THDA is the only agency authorized by Tennessee law to be the administrator of Project-Based Section 8 Housing Assistance Payments contracts for the State of Tennessee. For the reasons set forth below, we believe that THDA is the only agency so authorized.

The General Assembly created THDA when it enacted the Tennessee Housing Development Agency Act, codified at Tenn. Code Ann. §§ 13-23-101 to -133. THDA is a body, politic and corporate, and it is a political subdivision and instrumentality of the State. Tenn. Code Ann. § 13-23-104. The General Assembly has proclaimed:

> The Agency . . . shall be deemed to be acting in all respects for the benefit of the people of the state in the performance of essential public functions and shall be deemed to be serving a public purpose and improving and otherwise promoting the health, welfare, and prosperity of the people of the state, and that the Tennessee housing development agency shall be empowered to act on behalf of the state of Tennessee and its people in serving this public purpose for the benefit of the general public.

Tenn. Code Ann. § 13-23-104.

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[2] Subsection (B) of 42 U.S.C. § 1437a(b)(6) addresses the meaning of "public housing agency" for purposes of the Section 8 program for tenant-based assistance.

[3] The term "development" means "any or all undertakings necessary for planning, land acquisition, demolition, construction, or equipment, in connection with a low-income housing project. . . ." 42 U.S.C. § 1437a(c)(1). The term "operation" includes "any or all undertakings appropriate for management, operation, services, maintenance, security (including the cost of security personnel), or financing in connection with a low-income housing project. . . ." 42 U.S.C. § 1437a(c)(2). The term "low-income housing project" contained within each of these definitions means "(A) housing developed, acquired, or assisted by a public housing agency under this chapter, and (B) the improvement of any such housing." 42 U.S.C. § 1437a(b)(1).

THDA's purposes include promoting the production of affordable housing units and the preservation and rehabilitation of existing housing units for very low, low and moderate income individuals and families. Tenn. Code Ann. § 13-23-102. To effectuate its purposes, THDA is authorized to perform the following functions, among others: to contract for and accept funds from the United States or any agency or instrumentality thereof and to comply with the terms and conditions associated with such funds, Tenn. Code Ann. § 13-23-115(14); to provide construction and permanent financing for land development and construction of housing for lower and moderate income persons, Tenn. Code Ann. § 13-23-102(1),(2) & Tenn. Code Ann. § 13-23-115(1),(2); to make and administer grants to political subdivisions and private nonprofit corporations for housing and related services, Tenn. Code Ann. § 13-23-102(6) & Tenn. Code Ann. § 13-23-115(31); to enter into all contracts and agreements necessary, convenient or desirable to carry out its purposes or to perform its duties in connection therewith, Tenn. Code Ann. § 13-23-115(13); to employ employees and others as determined in the judgment of THDA, Tenn. Code Ann. § 13-23-115(21); to provide technical and advisory services to those involved in all aspects of affordable residential housing, Tenn. Code Ann. § 13-23-115(22); to promote research and development in proper land use planning, Tenn. Code Ann. § 13-23-115 (23); and to "[d]o any and all things necessary or convenient to carry out its purposes and exercise the powers given and granted. . . ." Tenn. Code Ann. § 13-23-115(28).

In sum, the General Assembly has determined that providing affordable housing for low and moderate income persons is of critical importance, and it has established a pervasive regulatory scheme in which THDA is bestowed with sweeping powers to provide such housing on a state-wide basis – powers which include those necessary to administer Project-Based Section 8 Housing Assistance Payments contracts throughout the State of Tennessee. Moreover, the General Assembly has given THDA explicit authority to contract for and accept funds from the United States or any agency or instrumentality thereof and to comply with the terms and conditions associated with such funds.

Therefore, we conclude THDA is a "public housing agency" under 42 U.S.C. § 1437a(b)(6)(A) since it is an instrumentality of the State of Tennessee that "is authorized to engage in or assist in the development or operation of public housing" in this State. Further, we conclude that THDA is the only "public housing agency" authorized to administer Project-Based Section 8 Housing Assistance Payments contracts for the State of Tennessee, given that the General Assembly has created no other entity with the authority to administer a state-wide Project-Based Section 8 contract. In so concluding, we believe the authorization provision of 42 U.S.C. § 1437a(b)(6)(A) implicitly requires that such authorization be granted by the legislative body of the State in which the public housing agency operates. While Congress could permit a public housing agency created by the laws of one state to operate as a public housing agency in another state, the contrasting definition of a public housing agency for a tenant-based assistance program indicates that Congress has not conferred such permission. In 42 U.S.C. § 1437a(b)(6)(B)(iii)(II), Congress expands the definition of public housing agency "[f]or purposes of the program for tenant-based assistance" to include, "notwithstanding any provision of State or local law, a public housing agency for another area that contracts with [HUD] to administer a program for housing assistance under section 1437f of this title, without regard to any otherwise applicable limitations on its area of operation" when "no public housing agency has been organized or where [HUD] determines that a public housing agency is unwilling or unable to

implement a program for tenant-based assistance. . . ." Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. *INS v. Cardoza–Fonseca*, 480 U.S. 421, 432, (1987) (citations omitted).

ROBERT E. COOPER, JR.
Attorney General and Reporter

WILLIAM E. YOUNG
Solicitor General

LAURA T. KIDWELL
Senior Counsel

Requested by:

Ted R. Fellman, Executive Director
Tennessee Housing Development Agency
404 James Robertson Parkway, Suite 1200
Nashville, TN 37243-0900

COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II
Attorney General

June 1, 2012

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

Mr. William C. Shelton
Director, Virginia Department of Housing and Community Development
Main Street Centre
600 East Main Street, Suite 300
Richmond, Virginia 23219

Dear Mr. Shelton:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You inquire whether a local, regional or consolidated housing authority organized pursuant to the Housing Authorities Law[1] is authorized to operate throughout the entire Commonwealth without first meeting the requirements of § 36-23.

Response

It is my opinion that a local, regional or consolidated housing authority may not operate throughout the entire Commonwealth without first meeting the requirements of § 36-23.

Background

You relate that the Virginia Department of Housing and Community Development and the Virginia Housing Development Authority are currently preparing an application to the federal Department of Housing and Urban Development ("HUD") to serve as the Performance-Based Contract Administrator for project-based Section 8 housing assistance in Virginia. You indicate that the Notice of Funding Availability issued by HUD for this program sets forth certain eligibility criteria for applicants, including a requirement that the applicant have the legal authority to operate throughout the entire state for which it is applying for funds.

Applicable Law and Discussion

Virginia follows the Dillon Rule of strict construction that provides that municipal corporations have "only those powers which are expressly granted by the state legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable."[2]

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[1] VA. CODE ANN. §§ 36-1 through 36-55.6 (2011).

[2] Arlington Cnty. v. White, 259 Va. 708, 712, 528 S.E.2d 706, 708 (2000) (citing City of Va. Beach v. Hay, 258 Va. 217, 221, 518 S.E.2d 314, 316 (1999)). *See also* City of Richmond v. Bd. of Supvrs., 199 Va. 679, 684, 101 S.E.2d 641, 645 (1958).

Moreover, "the Dillon Rule is applicable to determine in the first instance, from express words or by implication, whether a power exists at all. If the power cannot be found, the inquiry is at an end."[3]

The Housing Authorities Law creates "[i]n each locality" a housing authority as a political subdivision of the Commonwealth.[4] Any such local housing authority, however, may transact business and exercise its powers only after having received the affirmative approval of the qualified voters "of such locality" by a majority vote of such qualified voters voting in a referendum.[5] A housing authority is generally granted enumerated powers to act within its "area of operation," which is coextensive with the boundaries of the locality within which it was created.[6]

A housing authority may exercise any of its powers outside of its area of operation only upon compliance with the procedures for authorization of such actions as set forth in § 36-23, which includes receiving the approval of the governing body of each locality in which the housing authority is requesting to act.[7]

Conclusion

Accordingly, it is my opinion that a local, regional or consolidated housing authority organized pursuant to the Housing Authorities Law is not authorized to operate throughout the entire Commonwealth without first meeting the requirements of § 36-23.

With kindest regards, I am

Very truly yours,

Kenneth T. Cuccinelli, II
Attorney General

---

[3] Commonwealth v. Cnty. Bd., 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977). Any fair, reasonable doubt as to the existence of such power must be resolved against the locality. *See City of Richmond*, 199 Va. at 684, 101 S.E.2d at 645.

[4] *See* § 36-4.

[5] *Id.*

[6] *See* § 36-3 ("'Area of operation' means an area that (i) in the case of a housing authority of a city, shall be coextensive with the territorial boundaries of the city; (ii) in the case of a housing authority of a county, shall include all of the county, except that portion which lies within the territorial boundaries of (a) any city, and (b) any town that has created a housing authority pursuant to this chapter; (iii) in the case of a housing authority of a town, shall be coextensive with the territorial boundaries of the town as herein defined."); *see also* §§ 36-19 (enumerating powers granted to a housing authority within its area of operation); 36-19.5 (granting certain additional powers to a housing authority to acquire dwelling units within its area of operation); and 36-26 (authorizing a housing authority to borrow money or accept other financial assistance from the federal government for or in aid of any housing project within the authority's area of operation). *See also* Va. Electric & Power Co. v. Hampton Redev. & Hous. Auth., 217 Va. 30, 33, 225 S.E.2d 364, 367 (1976) (under the terms of the Housing Authorities Law, "a municipal housing authority is an entity purely local in nature and not a state agency performing a function of state government").

[7] *See* § 36-23. This section requires a governing body to hold a public hearing and to make certain specifically enumerated findings prior to authorizing a housing authority to operate within the locality. In addition, if a housing authority already has been established for that locality, this authority also must adopt a resolution declaring that there is a need for the other housing authority to exercise its powers within the locality.

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

(304) 558-2021
FAX: (304) 558-0140

June 8, 2012

Erica L. Boggess, Acting Executive Director
West Virginia Housing Development Fund
5710 MacCorkle Avenue, SE
Charleston, WV 25304

Re: Advisory Oopinion - Authority to act as Public Housing Authority in the State of West Virginia

Dear Ms. Boggess:

We are responding to your request on behalf of West Virginia Housing Development Fund for an opinion from the Attorney General on the questions of (1) whether West Virginia Housing Development Fund is authorized to serve as the Performance-Based Contract Administrator for the State of West Virginia, and (2) whether any city, county or regional authority formed under West Virginia Code §§ 16-15-3 or 4 is a "public housing authority" authorized to serve as a PBCA for the State of West Virginia.

We have reviewed, among other materials, West Virginia Code § 15-16-1 *et seq.*, the PBCA Invitation, including Section 2.2, "Statutory Definition of 'Public Housing Agency' and Related Statutory Definitions," and the United States Housing Act of 1937, 42 U.S.C. § 1437 *et seq.*

Further, it is our understanding that the Annual Contributions Contract to be awarded in this instance may only be awarded, pursuant to 42 U.S.C. § 1437f(b)(1), to a "public housing agency" that is authorized to act throughout the state in accordance with the laws of the state.

It is our opinion that (1) West Virginia Housing Development Fund is authorized to serve as a PBCA for the State of West Virginia, and that (2) city, county or regional authorities formed under West Virginia Code §§ 16-15-3 or 4, having limited geographical authority, are not authorized to serve as a PCBA for the State of West Virginia.

We are preparing a detailed analysis of our reasoning for your review, but in light of the deadline for submission, we herewith submit this opinion as to our ultimate conclusions of law.

Very truly yours,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

By: Barbara H. Allen

Barbara H. Allen
Managing Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 15th day of August, a copy of Volume 2 of 2 of the Joint Appendix was served upon all parties via the Court's electronic filing system.

/S/ Elizabeth M. Gill
Elizabeth M. Gill